165-483

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 602.

THE WINONA AND ST. PETER RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED SEPTEMBER 11, 1896.

(16,381.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1896.

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Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1895, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday, to wit, the sixth day, of May, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the third day of December, A. D. 1894, a transcript of record, in pursuance to an appeal allowed by the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of The United States of America, appellant, *vs.* The Winona and St. Peter Railroad Company *et al.*; which said transcript of record is in the words and figures following, to wit:

2 Circuit Court of the United States in and for the District of Minnesota, Third Division.

THE UNITED STATES OF AMERICA, Complainant and Appellant,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, THE WINONA & St. Peter Land Company, and Thomas Marshall, Jr., Respondents.

THE UNITED STATES OF AMERICA, *ss:*

To the Winona & St. Peter Railroad Company, the Winona & St. Peter Land Company, and Thomas Marshall, Jr., Greeting:

You and each of you are hereby cited and admonished to be and appear at the United States circuit court of appeals for the 8th circuit, to be holden at the city of St. Louis, Missouri, sixty days from and after the date hereof, pursuant to an appeal taken out of and allowed by the circuit court of the United States for the dis-
3 trict of Minnesota, third division, wherein The United States of America is appellant and The Winona & St. Peter Railroad Company, The Winona & St. Peter Land Company and Thomas Marshall, Jr., are respondents, to show cause, if any there be, why the decree in the said appeal mentioned, should not be set aside and corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter H. Sanborn, judge of the United States circuit court for the district of Minnesota, this 13th day of November, in the year of our Lord, one thousand eight hundred and ninety-four.

WALTER H. SANBORN,
Circuit Judge.

(Title of Cause.)

Comes now The United States of America, complainant in the above-entitled action, by Robert G. Evans, special assistant United States attorney, hereunto lawfully authorized and directed by the honorable, the Attorney General of the United States so to do, and conceiving itself aggrieved by the decree entered in the above-entitled cause on the 29th day of August, 1894, doth hereby appeal from said decree to the United States circuit court of appeals for the eighth circuit, and said complainant prays that its said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may
4 be sent to the United States circuit court of appeals for the eighth circuit.

ROBERT G. EVANS,
Special Ass't United States Att'y, Counsel & Solicitor for Complainant and Appellant.

Dated November 10, 1894.

And now, to wit, on November 13th, 1894, it is ordered that the appeal in the above-entitled cause be allowed as prayed for.

WALTER H. SANBORN,
Circuit Judge, 8th Circuit.

(Title of Cause.)

Assignment of Error.

And now in the foregoing-entitled cause and at the time of filing therein of the foregoing and attached petition for appeal, comes the said appellant, The United States of America, by Robert G. Evans, special assistant United States attorney, hereunto lawfully authorized and directed by the honorable Attorney General of the United States, and says, that in the records and proceedings in the above-entitled cause, there is manifest error in this, that the court erred:

First. In not holding that the land in the bill of complaint described, lying within the place limits of the line of road of the Winona & St. Peter Railroad Company, to which pre-emption rights in favor of Thomas Marshall, Jr., were attached before, at, and after the time of the route of said road opposite and past
5 the same was definitely fixed, was excepted from the operation of the grants made by Congress in aid of the construction of the line of said road.

Second. In not holding that the officials of the Land Department in certifying such lands to the State of Minnesota for the benefit of said line acted without authority of law and that such action was void.

Third. In not holding that the defendants obtained no right, title or interest whatever in or to the land in controversy by reason of

the certification thereof to the State of Minnesota for the benefit of the line of said road.

Fourth. In holding that in view of former rulings of the officers of the Land Department and the lapse of time since the land in controversy was certified, the complainant was not entitled to the relief prayed for in its bill.

Fifth. In holding that the land involved in this suit had, before the same was commenced, passed into the hands of a *bona fide* purchaser, through and under the Winona & St. Peter Railroad Company, and that because of this complainant could not recover.

Sixth. In holding that complainant could not recover because of laches.

Seventh. In holding that complainant could not recover because of the staleness of its claim.

Eighth. In holding that the Winona & St. Peter Land Company was a good-faith purchaser of the land in controversy.

Ninth. In holding that D. N. Barney and his associates, referred to in the record, were good-faith purchasers of the land in controversy.

Tenth. In holding that the certification to the State of
6 Minnesota for the benefit of the Winona & St. Peter Railroad Company and the conveyance by said State to said company, vested in the said railroad company the legal or any title to the land so certified and conveyed.

Eleventh. In holding that although the lands in controversy may have been certified without authority, complainant cannot under the act of Congress of March 3, 1887, have such certification set aside, if the land passed into the hands of a *bona fide* purchaser.

Twelfth. In sustaining the motion of defendants to strike out the interrogatories and cross-interrogatories propounded to the Commissioner of the General Land Office, and his answers thereto, relative to the non-adjustment of the grant in aid of the line of road of the Winona & St. Peter Railroad Company found in the Record on pages 166–170 inclusive.

Thirteenth. In sustaining the motion to strike out the interrogatories and cross-interrogatories propounded to the chief clerk of the railroad division of the General Land Office, and his answers thereto relative to the non-adjustment of the grant in aid of the line of road of the Winona & St. Peter Railroad Company, as found in the Record on pages 171–175 inclusive.

Fourteenth. In holding that the judgment of the district court of the State of Minnesota set out in the agreed statement of facts (Record, p. 39, subdivision 8th) in an action wherein The Winona & St. Peter Land Company was plaintiff and Thomas Marshall, Jr., was defendant constituted an estoppel against complainant or in any manner affected complainant's right to maintain this action.

7 Fifteenth. In dismissing the complainant's bill of complaint.

Wherefore, the said appellant prays that the decree of the said

circuit court of the United States for the district of Minnesota, in the above-entitled cause, be reversed.

ROBERT G. EVANS,
Special Ass't United States Att'y,
Solictor and Counsel for Appellant.

(Title of Cause.)

The complainant in the above-entitled action having appealed from the decree rendered therein dismissing its bill of complaint, to the circuit court of appeals of the eighth circuit, and said appeal having been allowed, it is hereby stipulated and agreed by and between the parties to the above-entitled action that in order to save the expense of reprinting the record in said action on appeal, and to expedite the hearing of said appeal, the trial record as printed for the hearing in the circuit court having added thereto the decree, petition for, and order allowing appeal, complainant's assignments of error, and citation, all of which have been duly served, the motion of defendants to strike out the interrogatories, cross-interrogatories and the answers thereto, propounded to and answered by the Commissioner of the General Land Office and the chief clerk of the railway division of the General Land Office, the stipulation and order changing the venue of said action and all orders made and stipulations entered into not now contained in said printed record of the United States circuit court for the district of
8 Minnesota, third division, *and* may be considered and taken by said circuit court of appeals as the full, true and complete record of all proceedings therein, except that the maps used in the hearing of said case in the court below, may also be used without printing the same in the record of said circuit court of appeals; and all opinions and decisions stipulated as evidence in the court below, may be used upon the hearing of the appeal from the printed books in which they appear. It is further stipulated and agreed that the complainant need not file with the clerk of said circuit court of appeals, to exceed 12 copies of said printed record.

ROBERT G. EVANS,
Solicitor and Counsel for Complainant and Appellant.
WILSON & BOWERS,
Solicitors for Winona & St. Peter Railroad Company.
J. A. TAWNEY AND
H. M. LAMBERTON,
Solicitors for Winona & St. Peter Land Company.
MARK H. DUNNELL,
Solicitor for Thomas Marshall, Jr.

All the foregoing endorsed:
Filed November 13th, 1894. Oscar B. Hillis, clerk.

9 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1894.

THURSDAY MORNING, *August* 16 1894.

Court opened pursuant to adjournment.

Present: Hon. John A. Williams, judge; Hon. E. C. Stringer, U. S. district attorney.

UNITED STATES OF AMERICA *vs.* THE WINONA & ST. PETER RAILROAD COMPANY, Winona & St. Peter Land Company, and Thomas Marshall, Jr.	Eq. C. No. 651.

This cause regularly coming on for hearing, upon the pleadings, final proofs and arguments of counsel, the complainant appears by its solicitor, Robert G. Evans, and the defendants, by their solicitors, Wilson & Bowers.

Thereupon defendants' solicitors file a written motion to strike out the deposition of Hon. F. W. Lamoreux, Commissioner of the General Land Office, also the deposition of W. F. McGee, of the railroad division of the Land Office.

Whereupon the court after hearing the arguments of said
10 solicitors and being fully advised in the premises sustains said motion. And it is hereby ordered that the depositions of said named parties be and they are hereby suppressed and stricken out.

Defendants' said solicitors also, orally and in open court, enter a motion to strike out Complainant's Exhibit B, being a tabular statement purporting to show the lands granted by Congress for the construction of railroads, wagon roads, canal and river improvements, with data relevant thereto, transmitted by S. M. Stockslager, acting Commissioner to Hon. Wm. F. Vilas, under date of March 8, 1888.

Whereupon said motion being fully argued by the solicitors for said parties and the court being fully advised concerning the same, it is by the court ordered that said motion be and the same hereby is sustained, and said Exhibit B is stricken out.

Thereupon the above case is argued on behalf of the complainant by Robert G. Evans, its solicitor, and the hearing thereof not being concluded at the hour of adjournment, it is ordered that further proceedings herein be and they are hereby postponed until tomorrow morning at 10 o'clock.

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1894.

AUGUST 17TH, 1894.

Before Judge Williams.

11	UNITED STATES *vs.* WINONA & ST. PETER RAILROAD COMPANY, Winona and St. Peter Land Company, Thomas Marshall, Jr.	Eq. C. No. 657.

The above-entitled cause coming on to be further heard, it is further argued on behalf of the complainant by Robert G. Evans, and on behalf of the defendants by Thomas Wilson.

And the hearing of the same not being concluded at the hour of adjournment, it is ordered that further proceedings herein be and they are hereby postponed until tomorrow morning at 10 o'clock.

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1894.

AUGUST 18TH, 1894.

Before Judge Williams.

	UNITED STATES *vs.* WINONA & ST. PETER RAILROAD COMPANY, Winona and St. Peter Land Company, Thomas Marshall, Jr.	No. C. Eq., 651.

The above-entitled cause coming on to be further heard, the same is further argued on behalf of the defendants by Thomas Wilson, their solicitor, and the hearing of the same not being con-
12 cluded at the hour of adjournment, it is ordered that further proceedings herein be and they are postponed until Monday morning at 10 o'clock.

Ordered that this court do now adjourn until Monday morning at 10 o'clock.

A true record.

Attest:

O. B. HILLIS, *Clerk.*

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1894.

AUGUST 20TH, 1894.

Before Judge Williams.

UNITED STATES vs. WINONA & ST. PETER RAILROAD COMPANY, Winona and St. Peter Land Company, Thomas Marshall, Jr.	C. Eq. No. 651.

The above-entitled cause coming on to be further heard, the same is further argued on behalf of the complainant by Robert G. Evans, complainant's solicitor.

Whereupon the same is duly submitted and by the court taken under advisement.

13 Term Minutes, June Term, A. D. 1894.

AUGUST 29TH, 1894.

Eq. C. No. 651.

(Title of Cause.)

Decree.

This cause came on to be heard at the June, A. D. 1894 term of this court upon the pleadings and final proofs therein and was argued by counsel.

And thereupon, upon consideration thereof, it is hereby by the court ordered, adjudged and decreed that the complainant's bill of complaint herein be and the same is in all things dismissed and that the defendants recover of the complainants their costs and disbursements, to be taxed and have execution therefor.

Dated this 29th day of August, A. D. 1894.

JOHN A. WILLIAMS, *Judge.*

In the Circuit Court of the United States, District of Minnesota, Second Division.

THE UNITED STATES OF AMERICA, Complainant, vs. THE WINONA & ST. PETER RAILROAD COMPANY, The Winona and St. Peter Land Company, and Thomas Marshall, Jr., Defendants.	No. 651, C. Equity.

It is hereby stipulated by and between the attorneys for the
14 above-named parties respectively, that the venue of each of

the above-entitled cases be changed to the third division of said circuit court.

Dated St. Paul, March 1st, 1894.

ROBERT G. EVANS,
Special Ass't United States District Attorney and of Counsel for the Complainant.
WILSON & BOWERS,
Attorneys for the Defendants The W. & St. P. R. R. Co. and The W. & St. P. L. Co.
MARK H. DUNNELL,
Attorney for the Defendant Thomas Marshall, Jr.

(Endorsed:) Stipulation for change of venue. Filed Aug. 16th, 1894. Oscar B. Hillis, clerk.

15 In the Circuit Court of the United States in and for the District of Minnesota, First Division.

UNITED STATES OF AMERICA, Complainant,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY, THE WINONA and St. Peter Land Company, and Thomas Marshall, Jr., Defendants.

To the honorable the judges of the circuit court for the district of Minnesota:

The United States of America, by its Attorney General, brings this its bill against The Winona and Saint Peter Railroad Company, and The Winona and Saint Peter Land Company, each a corporation organized, incorporated and existing under and
16 pursuant to the laws of the State of Minnesota and citizens of said State and Thomas Marshall, Jr., a resident and citizen of said State.

Humbly complaining showeth your orator unto your honors:

First. That the above-named defendant, The Winona and St. Peter Railroad Company, is and at all times hereinafter stated since its organization was one of the railway corporations of the State of Minnesota.

Second. That under and pursuant to an act of the legislature of the Territory of Minnesota entitled "A bill to incorporate the Transit Railroad Company," approved March 3d, A. D. 1855, a railroad corporation was duly created and organized under the name and style of the Transit Railroad Company. That in pursuance of said act and the organization aforesaid the said Transit Railroad Company became and continued to exist as a railroad company under the title and name aforesaid within the said Territory and State of Minnesota, and became and was one of the companies entitled to and competent to take and hold the grants and benefits conferred upon the Territory and future State of Minnesota by the provisions of an act of Congress entitled "An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the con-

struction of certain railroads in said Territory and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State," approved March 3rd, A. D. 1857.

Third. That subsequent to the creation of said Transit Railroad Company by various acts of the legislature of said Territory
17 and State of Minnesota the title of said Transit Company has become duly changed so that the same is now called and known as the Winona and St. Peter Railroad Company, one of the defendants in this action, and all the rights, claims, immunities and franchises which were conferred upon said Transit Railroad Company were by various legislative and other acts of the State of Minnesota conferred upon and vested in said Winona and St. Peter Railroad Company and all the rights and franchises which said defendant now has, claims or possesses are only by virtue of its succession to the rights, claims, immunities and franchises of the aforesaid Transit Railroad Company.

Fourth. That on the 3d day of March, A. D. 1857, the Congress of the United States by an act entitled "An act making and granting — of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory and granting public lands in the State of Alabama to aid in the construction of certain railroads in said State," approved March 3rd, A. D. 1857, granted to the Territory of Minnesota every alternate section of land designated by odd numbers for six sections in width on each side of certain railroads and their branches, to aid in the construction of certain lines of railroad in the said Territory of Minnesota.

Fifth. That by section one of said act of Congress there was granted to said Territory of Minnesota for the purpose of aiding in the construction of a railroad from Winona via Saint Peter in said Territory to a point on the Big Sioux river south of the forty-fifth parallel of north latitude, every alternate section of land des-
18 ignated by odd numbers for six sections in width on each side of said road and branches subject to the reservations, exceptions and provisos contained in said section and in the remaining sections of said act. That by section one of said act there was expressly reserved and excepted from said grant and which did not pass thereby all such aforesaid sections or parts thereof as it might appear had been sold by the United States or otherwise appropriated by it, or to which it might appear the right of pre-emption had attached prior to the time when the line or route of said road and branches had been definitely fixed. That the said Transit Railroad Company organized as hereinbefore alleged was organized for the purpose of constructing and undertook to construct the line of railroad hereinbefore described from Winona via Saint Peter to a point on the Big Sioux river south of the forty-fifth parallel of latitude and as such became entitled to the benefits of said act of March 3, 1857, given in aid of such railroad and as hereinbefore alleged the said defendant, The Winona and St. Peter Railroad Company, became and is its successor in interest to all the benefits and provisions of

said act of March 3, 1857, subject, however, to all the conditions and exceptions therein contained.

Sixth. That the said Transit Railroad Company under and by virtue of its corporate existence and the franchises and rights granted to it by the Territory of Minnesota for the purpose of entitling itself to the grants and benefits conferred by the aforesaid act of Congress did at various times and dates by filing a map thereof in the office of the Secretary of the Interior or Commissioner of the General Land Office definitely fix portions of the line or route
19 of its road, but that no part of its said line or route was so definitely fixed prior to the 29th day of July, 1858, on which day and not before its line or route was so definitely fixed opposite the tract of land hereinafter particularly described.

Seventh. That at the time of the definite fixing of its line or route as aforesaid many of the alternate sections of land designated by odd numbers for six sections in width on each side of said railroad as so definitely fixed and located, had been sold or otherwise disposed of by the United States and to many of said lands the rights of pre-emption or entry under the homestead laws of the United States had attached, which pre-emption or homestead rights were and remained in full force and uncancelled prior to, on, and long after the said 29th day of July, 1858—and such lands were by reason thereof excepted and reserved from the operation of the grant aforesaid. That among said lands so excepted and reserved from the operation of said grant is the following, viz: The northeast ¼ of section 35, township 106 north, range 18 west, which said land was reserved and excepted from said grant and disposed of by the United States by a filing or an entry thereof under and pursuant to the pre-emption laws of the United States by one Thomas Marshall, Jr., who, being then and there duly qualified to make such filing or entry, did, at the United States local land office at Faribault, Minnesota, on the 3d day of July, A. D. 1857, make a filing or entry of said tract of land, as a pre-emption claim under and in all things pursuant to the pre-emption laws of the United States, alleging settlement on said land on the 30th day of June, 1857, said land
20 being then and there open and subject to such pre-emption entry under the laws of the United States. That said Thomas Marshall, Jr., did in fact settle on said land on said 30th day of June, 1857, and remain in actual possession thereof until after the line or route of said defendant road opposite said land had been definitely fixed and while so in possession and before the line or route of said railroad was definitely fixed erected a house on said land and cultivated a portion thereof, and continued to cultivate the same until after the line or route of said railroad was definitely fixed.

Eighth. That said entry remained in full force and existence until long after the line or route of said railroad was definitely fixed in and through or opposite to said section 35.

Ninth. That notwithstanding the fact that the pre-emption rights of said Thomas Marshall, Jr., had attached to said land prior to the time when the line or route of said road was definitely fixed as

aforesaid and were in full force and effect at said time and long thereafter by reason of which said tract of land was excepted and reserved from the operation of said grant, the ministerial officers of your orator disregarding the provisions of said act and the amendments thereto did on the 1st day of December, 1862, erroneously and improperly and without authority of law so to do certify said tract of land to the State of Minnesota, which had succeeded to the rights and was charged with all the duties of the Territory of Minnesota under said act and the acts amendatory thereof, for the benefit of said defendant, The Winona and Saint Peter Railroad Company, as the successor in interest of said Transit Railroad
21 Company. That thereafter, on the 21st day of February, 1876, said State of Minnesota conveyed all its right, title and interest in and to said land to said defendant, the said Winona and Saint Peter Lailroad Company.

Tenth. That thereafter and on the 3rd day of March, A. D. 1887, the Congress of the United States passed an act entitled as follows: "An act to provide for the adjustment of land grants made by the Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," which said act contained the following provisions: "That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad grants made by Congress to aid in the construction of railroads heretofore unadjusted."

SECTION 2. "That if it shall appear upon the completion of such adjustments, respectively or sooner, that lands have been, from any cause heretofore erroneously certified or patented by the United States for the use or benefit of any company claiming by, through or under grant of the United States to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all of such lands whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety (90) days after the aforesaid demand shall have been made it shall thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel all
22 patents, certification or other evidence of title heretofore issued for such lands and to restore the title thereof to the United States."

Eleventh. That said tract of land hereinbefore described lies within the six-mile place limits of said defendant railroad and within the first one hundred and five miles of said road westwardly from Winona. That said land was erroneously and without authority of law certified to the State of Minnesota to aid in the construction of the said line of railroad as aforesaid and the right of pre-emption had attached to the same before and remained attached thereto at the time and after the line or route of said railroad was definitely fixed as hereinbefore more particularly set forth.

Twelfth. That at and prior to the 11th day of August, A. D.

1891, the said grant in aid of said railroad was and the same is still unadjusted and said land hereinbefore described having been erroneously certified or patented by the United States to said State of Minnesota for the benefit of the said defendant railroad company, and on the 11th day of August, A. D. 1891, it duly appearing that the grant in aid of said road was unadjusted and the said land described hereinbefore had been erroneously certified by the officers of the said United States to the State of Minnesota for the use and benefit of said company through and under grant from the United States to aid in the construction of said railroad, demand was duly made August 11th, A. D. 1891, by the Secretary of the Interior upon said railroad company for the relinquishment and reconveyance to the United States of the said tract of land hereinbefore described.

Thirteenth. That more than ninety (90) days have elapsed
23 since said demand was made and the said company refused during the said ninety (90) days and still refuses to relinquish or reconvey to the said United States said lands hereinbefore described.

Fourteenth. That prior to the 31st day of October, 1867, Danford N. Barney, Jessie Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Charles F. Latham, Ashbel H. Barney, Samuel N. Hoyt and Alfred M. Hoyt had loaned and advanced to the said defendant, The Winona and Saint Peter Railroad Company at various times large sums of money and had constructed and equipped one hundred and five miles of its road in the State of Minnesota. That on said day for the purpose of settling and adjusting the indebtedness of said Winona and St. Peter railroad to said Danford N. Barney and his aforesaid associates for money loaned and for the construction and equipment aforesaid the said Winona and Saint Peter Railroad Company and said Barney and his associates entered into an agreement, a copy of which is hereto attached marked Exhibit "A," by which among other things the said railroad company agreed to sell and convey to said Barney and his associates, and they agreed to accept in part satisfaction of said indebtedness all the land granted by Congress to aid in the construction of the first one hundred and five miles of said railroad extending westwardly from Winona except such parts of said land as might be necessary for the track, right of way, depots or depot grounds of said railroad, or any other purpose incidental to the operation of said railroad.

That said agreed-to-be-conveyed lands were not specifically
24 described in said agreement, but were described and referred to by the general terms of location aforesaid and in bulk.

That it was further provided by and in said agreement that said land should be conveyed by said defendant to said Barney and his associates or as they in writing might direct, whenever and as soon as said railroad company should obtain title to said land under such acts of Congress.

Fifteenth. That thereafter on or about the 8th day of April, 1875, the aforesaid associates of said Danford N. Barney and N. C. Barney and Charles T. Barney (who as your orator is informed and

believes were the successors in interest of said Danford N. Barney to the benefits of said agreement) organized and created under and pursuant to the laws of the State of Minnesota the defendant corporation, The Winona and Saint Peter Land Company and without any valuable consideration moving from said land company as your orator is informed and believes the said incorporators thereof assigned their rights under said aforesaid agreement to said corporation.

Sixteenth. That thereafter for the consideration set forth in said original agreement of October 31st, 1867, viz: the in part settlement of a pre-existing indebtedness to said Danford N. Barney and his associates, and for no other consideration whatever the said Winona and Saint Peter Railroad Company on the 21st day of April, 1876, without warranty of title conveyed the hereinbefore-described tract of land, which was included within the limits of the land agreed to be conveyed as aforesaid to said Danford N. Barney and his associates, to said defendant, The Winona and
25 Saint Peter Land Company. That said land company has no claim of title to or interest in said tract other than that hereinbefore set out.

And your orator further alleges that said Winona and Saint Peter Land Company is not a good-faith purchaser for value of said land without notice of the rights of your orator.

Seventeenth. That said Thomas Marshall, Jr., as such pre-emptioner, claims to have an interest in said land and is made a party hereto to answer to that interest if any he has.

And may it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court directed to the defendants, The Winona and Saint Peter Railroad Company, The Winona and Saint Peter Land Company and Thomas Marshall, Jr., commanding them and each of them at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honors in this honorable court and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular the premises and to stand to, perform and abide such order and decree therein as to your honors shall seem meet and your orator will ever pray.

Wherefore your orator prays for a decree herein against the defendants; that the land hereinbefore described be restored to your orator; that the certification thereof to the State of Minnesota, the conveyance thereof by said State of Minnesota to said defendant, The Winona and Saint Peter Railroad Company, and the con-
26 veyance by said railroad company to said defendant, The Winona and Saint Peter Land Company, and each thereof be set aside and cancelled and for such other and further relief as may be just.

W. H. H. MILLER,
Attorney General and Counsel.
EUGENE G. HAY,
United States District Attorney for Minnesota.
ROBERT G. EVANS,
Special Assistant U. S. Attorney, of Counsel.

(Exhibit "A" referred to in the foregoing bill of complaint is the same as Exhibit "A" attached to the agreed statement of facts hereinafter appearing.)

27 (Title of Cause.)

Answer of the Winona and St. Peter Railroad Company.

The answer of the above-named defendant, The Winona and St. Peter Railroad Company, to the bill of complaint of the above-named complain-t.

The defendant, The Winona and St. Peter Railroad Company, for answer to the bill of complaint in the above-entitled suit saith:

1. That it admits and avers that it is a corporation created and existing under the laws of the State of Minnesota, and that, in addition to the other property, powers, rights, privileges, immunities and franchises conferred upon it by the laws of the said State, it in the year A. D. 1862 succeeded to and ever since has possessed all the rights, powers, privileges, immunities, property and franchises theretofore conferred upon or assessed by the Transit Railroad Company; and that said Transit Railroad Company was a corporation created by and existing under the laws of the Territory and State of Minnesota having all the powers, rights, property, privileges, immunities and franchises alleged; and that the United States by the act of March 3rd, A. D. 1857, made a grant of lands to the said Territory to aid in the building of a certain line of railroad—

28 from Winona via St. Peter to a point on the Big Sioux river south of the 45th parallel latitude, which is the line of road of this defendant; and that the tract of land in question in this suit, viz., the northeast quarter of section thirty-five (35) in township one hundred and six (106) north of range eighteen (18) west, is within the six-mile or place limits of said grant as said limits were adjusted and fixed by the Secretary of the Interior of the United States; and that the defendant Thomas Marshall, Jr., claimed to have made a pre emption filing and claim thereon before the line of said railroad was definitely fixed opposite or past the same.

2. This defendant farther saith that by the said act of Congress the United States granted to the Territory of Minnesota for the purpose of aiding in the building of certain lines of railroad, including this defendant's said line, "every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads." And it was in and by said act provided: "But in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified so much land in alternate sections or parts of

sections as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the rights of pre-
29 emption have attached as aforesaid. * * * Provided that the land to be so located shall in no case be farther than fifteen miles from the lines of said road or branches and selected for and on account of each of said roads or branches." * * * "That the said lands hereby granted to the said Territory or future State shall be subject to the future disposal of the legislature thereof for the purposes herein expressed and no other, and the said railroads shall be and remain public highways for the use of the Government of the United States free of toll or other charge upon the transportation of any property of troops of the United States."

That by section 2 of an act of the legislature of the Territory of Minnesota approved May 22nd, A. D. 1857, entitled: "An act to execute the trust created by an act of Congress entitled, 'An act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State' and granting certain lands to railroad companies therein named," there were granted to and vested in the said Transit Railroad Company, all the interest and estate present and prospective of the said Territory and future State in or to any and all the lands granted by the United States to said Territory by said acts of Congress, together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said act in aid of the said line of road from Winona to the Big Sioux river.
30 And said Transit Railroad Company definitely located and fixed its line from Winona, its eastern terminus, westwardly via St. Peter to the west line of range 31 on or before July 14th, A. D. 1857, and before Marshall settled on or claimed said lands under the pre-emption laws of the United States. And under and by an act of the legislature of the State of Minnesota approved March 10th, A. D. 1862, entitled "An act to facilitate the construction of a railroad from Winona westerly by way of St. Peter" this defendant, on complying with the conditions upon which the grant was made, became entitled to receive from the governor of the State of Minnesota, acting for or in the name of the State, a deed in fee-simple of all the lands granted to aid in the building of its said line. And this defendant within the times and in the manner specified and required by the laws of the United States and of the State of Minnesota built, equipped and put into operation its said line of road and in all respects complied with the requirements of said act of March 10th, A. D. 1862, and thereby became entitled to all the lands granted in aid of said line. And on the 1st day of December, A. D. 1862, the Secretary of the Interior of the United States considered, held and decided that the lands in controversy in this suit were granted to the State of Minnesota, to aid in the building of defendant's said line of road, by the said act of Congress of March 3rd, A. D. 1857, and he on that day duly certified them to the State of Minnesota for the benefit of this defendant; and thereafter on the

12th day of February, A. D. 1867, the governor of the State of Minnesota for and in the name of the State conveyed them to this
31 defendant; and thereafter on the 1st day of April, A. D. 1876, this defendant sold and conveyed them to the Winona and St. Peter Land Company, which latter company purchased the same in good faith and for a valuable consideration without any notice or knowledge of any defect or infirmity in the title thereof, and believing that this defendant was legally and equitably entitled to and the owner thereof and that its title was valid and unimpeachable. And the said deed of conveyance by the governor of the State to this defendant was immediately recorded in the office of the land commissioner of Minnesota and on the — day of ——, A. D. 1876, in the office of the register of deeds of the county of Dodge, that being the county in which said lands lie; and the said deed by this defendant to the said Winona and St. Peter Land Company was thereafter duly recorded in the office of the register of deeds of said county of Dodge on the 30th day of November, A. D. 1876. And the defendant specifically denies that the defendant Marshall had before or at the time the defendant's line of road was definitely fixed opposite or past said lands, initiated or obtained any pre-emption rights thereupon or thereto or that he or any one before the definite location of defendant's line past them had settled upon or gone into possession of them. And this defendant saith that before the date at which said Marshall alleges he went into possession of said lands, and before he pretends and alleges that he filed on the same or claimed them under the pre-emption laws of the United States, they were duly withdrawn and reserved by the Secretary of the Interior from sale or pre-emption claim, filing or entry, for the purpose of aiding in the building of the defendant's
32 line of road, and were not at the time of said alleged settlement or filing subject to pre-emption. And as to whether the defendant Marshall was entitled under the laws of the United States to the right of pre-emption or whether he had at any time pretended to or did file on said lands or make any claim thereto under the pre-emption laws this defendant has neither knowledge nor information sufficient to form a belief, and therefore denies the same.

That before March 3rd, A. D. 1857, and up until the year 1879 it was uniformly held and ruled by the Secretary of the Interior and the other officers of the Land Department of the United States and by the governor and other executive officers, and by the courts of the State of Minnesota, (*a*) that a line of a railroad became and was definitely fixed so as to attach the grant to the odd-numbered sections within the granted limits, as against any homestead or pre-emption filing or entry thereafter initiated, as soon as and when it was surveyed, staked out and marked on the face of the earth; (*b*) that whenever on any subdivision of an odd-numbered section within the granted or place limits, at the date of the definite location of the road, there was a valid pre-emption or homestead filing or entry, which was afterwards set aside and cancelled before the adjustment of the grant, such subdivision thereupon enured to the

grant; and (*c*) that when such a filing or entry was fraudulent or invalid it did not operate to take the land out of the grant. And in pursuance of and in accordance with the aforesaid rules the grants to or for each and all of the land-grant railroad companies in the State of Minnesota were ad-
33 justed and administered. And prior to the year 1879 no court of the United States or of any State had, as this defendant alleges and believes, questioned the correctness of any of said rules. And relying on the correctness of said rules all the lands granted to the Territory or State of Minnesota in aid of railroads were certified to the State for the several lines of road that were respectively the beneficiaries of such grants, and conveyed by the State to the respective companies owning said several lines of road and sold and conveyed by said railroad companies respectively, to purchasers who settled on and improved them. That each and all of said rules were promulgated and enforced by the Secretary of the Interior and the other officer of the United States whose duty it was to adjust and administer such grants. And the lands enuring to the said grants in accordance with those rules, including the lands in question in this suit, were by said officers charged to the several grants respectively and deducted from the quantity of lands which the said land-grant companies, including this defendant, were entitled to receive under their respective grants. And, according to the statutes of the United States and the settled rules of the Interior Department of the United States, if the homestead and pre-emption entries and filings in the bill of complaint herein alleged to have been made on the lands in question had been allowed and sustained, or if it had been held that they excepted the lands on which they were made from the grant in aid of this defendant's line, this defendant would have had the right to select in lieu thereof an equal quantity of lands within the limits of its grant as indemnity for those so lost.

34 And when the lands in question were certified to the State as enuring to said grant there were within the limits of the defendant's grant, subject to be selected for such indemnity, a sufficient quantity of lands to make up for the loss of these. That by the disallowance of such entries and filings and by the certifying and charging of those lands to this defendant, and by the other rulings of the Secretary of the Interior the United States denied such right of selection; and all the lands which defendant could then have so selected have since been disposed of by the United States. And the United States, if they should now reverse the rulings heretofore made as aforesaid, would take advantage of their own wrong and unjustly deprive this defendant of its legal and equitable rights without any fault or negligence on its part. That said rules in accordance with which defendant's grant was adjusted, long since became rules of property that cannot now be disregarded or departed from without great injustice and irreparable injury to defendant and other land-grant railroad companies, in this State, and their grantees and successors in interest. That to depart from these rules now would unsettle and invalidate the title to many

hundred of thousands of acres of land, long since purchased by those who settled upon and improved the same, relying and having a right to rely on the then unbroken line of rulings and decisions of the Land Department of the United States, and of this and other States, and of the courts of this and other States. And this defendant denies that the United States lost any land by the aforesaid rulings, or that any of these lands would revert to the United States if the certificates or patents therefor were set aside.

35 That before the year 1867 this defendant built its line of road past the lands in controversy in this suit, and not until about the time this suit was begun did the United States or any of their officers question the right or title of this defendant to them. And after this defendant had conveyed them to the defendant, The Winona and St. Peter Land Company, to wit, on the — day of October, A. D. 1878, the defendant Marshall being in possession and claiming some interest in or right to them and therefore to have the right of possession of them, the defendant, The Winona and St. Peter Land Company, commenced an action of ejectment against him in the district court of Dodge county, that being the county in which said lands lie, to recover possession of them, and the court having jurisdiction of the subject-matter, and said Marshall having appeared in said action, such proceedings were had therein that it was by the court considered, held and adjudged that the plaintiff recover of the said defendant Marshall the possession of said lands, from which judgment no appeal was taken, and the same remains unreversed and in full force, and in pursuance of said judgment said Marshall surrendered possession of said lands to the defendant, The Winona and St. Peter Land Company, and this defendant insists that the fact that the right of this defendant to said lands *are* and *were* prior and paramount to any rights or claim of defendant Marshall is *res adjudicata*. And since the rendition of said judgment until the commencement of this suit, as this defendant believes, neither said Marshall nor any one made any claim of any right to or interest in said lands adverse to the Winona and St. Peter

36 Land Company, until this suit was begun, and the said Winona & St. Peter Land Company has ever since said judgment paid the taxes thereon and had full control and undisputed possession thereof.

That prior to January, 1890, and for many years prior to the passage of said act of March 3rd, 1887, the grant of lands in aid of this defendant's line of road had been adjusted from its eastern terminus at Winona westwardly to a point far west of the lands in question in this suit and practically throughout its entire length. And this defendant further alleges and insists that the United States cannot and should not maintain this suit because of the laches and delay in bringing the same and because of the long acquiescence in the claim and title of this defendant and its grantees and because this suit is barred by the statute of limitations of the State of Minnesota, and because the officers of the United States whose duty it was to construe, adjust and administer such grants certified to the State the lands in question as enuring to the State under the grant

and charged them to the defendant's grant and required this defendant to pay the fees to the register and receiver of the local land office for the certification of them and refused to permit this defendant to select lands in lieu of them, as it might have done, and because this defendant was clearly entitled to either these lands or an equal number of acres of other lands in lieu thereof, and because if the complainant should succeed in this suit this defendant, without either fault or negligence on its part, would by the acts of the officers of the United States authorized to act for the United States in the premises be deprived of both and because the rules in pursuance of which these lands were certified to the State and held
37 to enure to this defendant's grant long since became rules of property, the disregard of which now would work great injustice and irreparable injury to this defendant and the other beneficiaries of such grants in this State and to their grantees and successors in interest.

And this defendant avers and insists that the United States has no beneficial interest in the result of this suit, but that if the relief prayed for should be granted the United States would at most have only the formal or mere naked legal title to the lands in question while the lands and the whole beneficial interest therein would under the act of Congress of March 3rd, A. D. 1887, enure to the defendant, The Winona and St. Peter Land Company or the defendant Marshall or to some other private person in whose interest and for whose benefit this suit is brought and therefore that this suit is barred by the statute of limitations of the State of Minnesota—the bar of which this defendant invokes and insists upon—and by the laches in bringing this suit and by the long acquiescence in the claim and title of this defendant. And this defendant farther insists that the defendant Marshall is estopped to claim as against this defendant or its successors in interest that he has or ever had any interest in or right to said lands and that it is conclusively settled that the defendant's rights were and are prior and paramount to his.

And this defendant farther insists that the act of Congress of March 3rd, A. D. 1887, referred to is inapplicable to the grant of this defendant and especially to that part of it within which the lands in question lie, that was many years before this suit
38 was brought adjusted in accordance with rules then and theretofore unquestioned.

Except as above admitted this defendant denies each and every allegation of the bill of complaint.

Wherefore this defendant prays that it may be hence dismissed with its reasonable costs and charges in this behalf wrongfully sustained.

WILSON & BOWERS,
Solicitors for the Defendant, The Winona and St. Peter Railroad Company, Winona, Minnesota.

THOMAS WILSON, *Of Counsel.*

UNITED STATES OF AMERICA, }
District of Minnesota, } ss:

On this 23d day of May, A. D. 1892, before me personally appeared Marvin Hughitt, the president of the above-named defendant, The Winona and St. Peter Railroad Company, who being by me duly sworn deposes and says that he is the president of this, The Winona and St. Peter Railroad Company, and that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and that as to those matters he believes it to be true.

MARVIN HUGHITT.

Subscribed and sworn to before me this 23d day of May, A. D. 1892.

[NOTARY'S SEAL.] S. L. PERRIN,
Notary Public, County of Ramsey, State of Minnesota.

39 (Title of Cause.)

Answer of the Winona & St. Peter Land Company.

The Winona & St. Peter Land Company, one of the defendants above named, for its separate answer to the bill of complaint, of the above-named complainant saith:

First. This defendant admits that it is a corporation duly incorporated and existing under and pursuant to the laws of the State of Minnesota, and admits that The Winona & St. Peter Railroad Company, one of the defendants above named, is now and during all the time in said bill of complaint stated, has been one of the railway corporations of the State of Minnesota duly organized and existing under and by virtue of the laws of said State; and further this defendant admits that it and the said Winona & St. Peter Railroad Company are citizens of the said State of Minnesota, but that, whether, or not, Thomas Marshall, Jr., one of the defendants above named, is a resident and citizen of said State, or is a citizen of the United States, this defendant has no knowledge or information, and therefore denies the same.

Second. This defendant further admits and avers that the Transit Railroad Company referred to in said bill of complaint, was,
40 as alleged therein, a corporation duly created under and by virtue of the laws of the Territory and State of Minnesota, having all the rights, powers, property and franchises alleged in said bill of complaint, and that said railroad company was entitled to and competent to take and hold the grant and benefits conferred upon the Territory and future State of Minnesota, by the provisions of an act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama to aid

in the construction of a certain railroad in said State," which act of Congress was approved March 3rd, A. D. 1857.

Third. This defendant further admits and avers that by various acts of the legislature of said Territory and State of Minnesota, the said Winona & St. Peter Railroad Company duly acquired and succeeded to all the rights, property, immunities and franchises of said Transit Railroad Company, and also acquired all the rights, claims, immunities and franchises conferred upon said Transit Railroad Company by various legislative and other acts of said Territory and State of Minnesota, including the right to the lands granted by Congress to aid in the building of certain lines or railroads in said State.

Fourth. Further answering said bill of complaint, this defendant admits to be true, all the facts set forth in the fourth and fifth paragraphs thereof, except that portion of the fifth paragraph which pretends to state what lands are expressly reserved and ex-
41 cepted from said grant, and as to that part of said subdivision five, this defendant denies the same.

Fifth. For a further and separate answer to said bill of complaint, this defendant expressly denies that the line or route of the said Transit Railroad Company, or any part thereof, or that the line or route of the Winona & St. Peter Railroad Company, or any part thereof, was definitely fixed and located in the manner set forth in the sixth paragraph of said bill of complaint. And further this defendant expressly denies that the line or route of the said Transit Railroad Company or of the said Winona & St. Peter Railroad Company was not definitely fixed opposite the tract of land described in said bill of complaint prior to the 29th day of July, 1858, as alleged in the sixth paragraph thereof.

Sixth. This defendant further expressly denies that the N. E. quarter of section 35, township 106 north, range 18 west, was excepted and reserved from the operation of the grant mentioned and described in said bill of complaint; and expressly denies that any valid existing entry, or any entry whatever under the homestead laws of the United States had attached to said land prior to the definite fixing and locating of the line of said railroad opposite the same; and expressly denies that the right of pre-emption, either legally or otherwise, had attached to said land prior to the date the line and route of said railroad was definitely fixed and located opposite said land; and expressly denies that said land was sold or disposed of in any manner, whatever, by the United States prior
42 to the date the line or route of said railroad was definitely fixed and located opposite the same.

Seventh. Further this defendant denies that the said Thomas Marshall, Jr., did on the 3rd day of July, A. D. 1857, or any other time, make a pre-emption filing or entry in the local land office of the United States at Faribault, Minnesota, or elsewhere on the land described in said bill of complaint, or that he was qualified to do so; and denies that said land was on the said 3rd day of July, A. D.

1857, open and subject to pre-emption entry under the laws of the United States.

Eighth. This defendant also denies that said Thomas Marshall, Jr., made any homestead filing or pre-emption entry on said land, or that he acquired any rights whatever to said land prior to the time when the line or route of said road was definitely fixed opposite the same.

Ninth. This defendant admits that on the 3rd day of March, A. D. 1887, the Congress of the United States passed the act mentioned and referred to in the tenth subdivision of said bill of complaint, for the purposes therein set forth.

Tenth. This defendant admits that said tract of land, hereinbefore described, lies within the six-mile or "in-place" limits of the said Winona & St. Peter railroad and within the first one hundred and five miles of said road westwardly from Winona.

Eleventh. For a further and separate answer and defense to the bill of complaint, this defendant avers that by section one of
43 an act of Congress, approved March 3d, 1857, referred to in said bill of complaint, the United States granted to the Territory of Minnesota to aid in the building of certain railroads therein, including a railroad "from Winona via St. Peter to a point on the Big Sioux river, south of the forty-fifth parallel of the north latitude." * * * every alternate section of land, designated by odd numbers for six sections in width on each side of each of said roads and branches," and it was in and by said section of said act further provided "But in case it shall appear that the United States, have when the lines or routes of said roads and branches are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid."

And it was by section three of this act provided "That the said lands hereinbefore granted to the said Territory or future State shall be subject to the future disposal of the legislature thereof, for the purposes herein expressed, and no other."

Twelfth. That the Transit Railroad Company definitely located and fixed its line of railroad from Winona, its eastern terminus, westerly via St. Peter to the west line of range 31, in the year
44 1857, and definitely fixed and located the line of its road opposite the land in question on the 5th day of June, 1857.

This defendant on information and belief admits that the said Transit Railroad Company filed in the office of the Secretary of the Interior of the United States, a map showing the line and route of its road as definitely fixed and located opposite the land in question; but defendant avers the act granting said lands hereinbefore referred to, did not require said company to file a map of definite loca-

tion of the line or route of its said road, and that the same was filed merely for the convenience of the officers charged with the duty of certifying lands for the benefit of said company, and that as to whether or not the said railroad company filed said map on the 29th day of July, 1858, and not before, this defendant has no knowledge or information, and therefore denies the same.

Thirteenth. That by section two of an act of the legislature, approved May 22nd, 1857, entitled "An act to execute the trust created by an act of Congress," entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State, and granting certain lands to railroad companies therein named." There was granted to and vested in the said Transit Railroad Company, all the interest and estate present and prospective of said Territory and future State, in or to any and all lands granted by the United
45 States to said Territory by said act of Congress, approved March 3rd, A. D. 1857, to aid in the building of said Transit railroad, together with all and singular the rights, privileges and immunities, conferred or intended to be conferred, by said act in aid of said line of road from Winona via St. Peter to the Big Sioux river.

And by the act of the legislature of the State of Minnesota, approved March 10th, 1862, entitled "An act to facilitate the construction of a railroad from Winona westwardly via St. Peter to the Big Sioux river," the Winona & St. Peter Railroad Company, complying with the conditions upon which the said grant was made, became entitled to receive from the governor of the State of Minnesota, acting for and in the name of said State, a deed in fee-simple for all the lands granted to aid in the building of its said line, including the land described in the bill of complaint.

That, as defendant is informed and believes, the said Winona & St. Peter Railroad Company within the time and in the manner specified and required by the laws of the United States and the State of Minnesota, built, equipped and put into operation its said line of road and became entitled to all the lands granted by Congress to aid in the building of its said road, including the land described in the bill of complaint.

Fourteenth. Further this defendant avers that the legal title to the land described in the bill of complaint, together with a large quantity of other land, was duly and properly conveyed by patent or certificate from the United States to the State of Minnesota by the Secretary of the Interior, and thereafter duly conveyed by said
46 State to the Winona & St. Peter Railroad Company, as part and parcel of the land to which said company was legally entitled under and by virtue of the said act of Congress and the said several acts of the legislature of the said Territory and State of Minnesota. That thereafter, to wit: on or about the 21st day of April, 1876, the said Winona & St. Peter Railroad Company for a valuable consideration, conveyed the land involved in this suit, together with

other lands, to this defendant. That this defendant now owns in fee said lands and is in possession thereof. That at the time of said purchase and for a long time subsequent thereto, this defendant had no notice or knowledge whatever that the Government or any person had or claimed any right, title or interest in or to said land at the time of its said purchase, except the said Winona & St. Peter Railroad Company, and that it purchased and took said land in entire good faith, relying upon the act of the Government in certifying the same to the State for the benefit of the said railroad company and believing that said railroad company was the true and lawful owner thereof.

Further this defendant avers on information and belief, that at the time of purchasing said land and receiving the deed therefor from said railroad company, and for a long time prior and subsequent thereto, it was uniformly held and decided by the Attorney General of the United States, the Secretary of the Interior and other officers of the Land Department of the United States, and by the governor and other executive officers and the courts of the State of Minnesota, that the line of a railroad became and was definitely fixed and that the grant of land to aid in the building of such railroad attached, and that the rights of such railroad
47 companies to the fee of the odd-numbered sections within the granted limits attached, as against any homestead or pre-emption filing or entry thereafter initiated, as soon as, and when the line of such railroad company was surveyed, staked out and marked on the face of the earth, and that no valid homestead filing or pre-emption entry could thereafter be made upon such odd-numbered sections within the limits of the grant. And in pursuance of and in accordance with the aforesaid rules and decisions, the grant to aid in the building of the said Winona & St. Peter railroad up to and beyond range 18, was adjusted and administered by the Supreme Court of the United States and by the Secretary of the Interior and other officers of the Land Department of the United States. And prior to the year 1879, no court of the United States or any State had, as this defendant alleges and believes, questioned the correctness of said rules and decisions. Relying and acting upon the correctness of said rules and decisions, the lands granted to the Territory or State of Minnesota to aid in the building of said Winona & St. Peter railroad, were certified to said State for the benefit of the said company owning said road, including the land involved in this suit, and thereafter said land was conveyed to said railroad company by said State and by said railroad company, for a valuable consideration, conveyed to this defendant and other purchasers, many of whom settled on and have made valuable improvements thereon. That each and all of said rules and decisions were promulgated and enforced by the Secretary of the Interior and other officers of the United States whose duty it was to adjust and administer said grant, and the lands
48 inuring to said grant in accordance with said rules and decisions, including the land in controversy, were by said officers charged to the said grant and deducted from the quantity of

lands which said railroad company was entitled to receive thereunder; and that this practice was uniformly adopted and applied by said officers to all land-grant railroads in said State up to the year 1883. That not until long after this defendant obtained title to the land in question aforesaid, did the United States or any officer thereof question the right of this defendant or the validity of its title to any part of said land. That the rules and decisions in accordance with which the grant to the State of Minnesota to aid in the building the railroad of the said Winona & St. Peter Railroad Company was administered, long since became rules of property that cannot now be disregarded without doing an injustice, an irreparable injury to this defendant and many others who innocently and for value purchased their said land, relying thereon and without notice or knowledge that the Government had or would ever claim any right or interest whatever in their lands. That for the United States to now reverse the rules and decisions heretofore made as aforesaid, would take advantage of its wrong or negligence and unjustly deprive this defendant of its legal property rights, without any fault or negligence on its part.

Fifteenth. For a further answer to said bill of complaint, this defendant alleges that in an action brought by it against Thomas Marshall, Jr., in the district court in and for the county of Dodge, State of Minnesota, to recover possession of the land described in said bill of complaint, it was adjudged and decreed that this
49 defendant was the legal owner of said land and entitled to the possession thereof. That said Marshall had no right or interest therein by virtue of his alleged and pretended pre-emption entry, and that said entry was absolutely void and of no effect and gave him no rights whatever in the property claimed. That said judgment was duly entered and docketed in said court on the 9th day of December, 1878.

This defendant alleges that there is a defect of parties defendant herein, in that the State of Minnesota, one of the defendants' grantors, is not a party defendant in this suit, and this defendant insists that said State is a necessary and indispensable party defendant, and that without its presence this court should not and cannot proceed with the hearing or trial, or grant the relief prayed for or any relief against this defendant. This defendant further alleges that the United States as complainant cannot and should not maintain this suit because of the laches and delay in alleging or claiming that the certification of the said land to the State was irregular and unauthorized, and because the officers of the United States whose duty it was to construe, adjust and administer said grant, certified to the State the land in question as inuring to the State under the said grant. That except as hereinbefore admitted, qualified or expressly denied, this defendant denies each and every allegation in said bill of complaint contained.

Wherefore, this defendant prays that it may hence be dismissed

with its reasonable costs and charges in this behalf wrongfully sustained.

J. A. TAWNEY AND
H. M. LAMBERTON,
Defendant's Solicitors, Winona, Minnesota.
THE WINONA & ST. PETER LAND CO.,
By H. W. LAMBERTON, *Land Commissioner.*

To each of the foregoing answers general replications were duly filed.

50 (Title of Cause.)

Answer of Thos. Marshall, Jr.

Thomas Marshall, Jr., one of the defendants above named, for his separate answer to the bill of complaint of the above-named complainant, saith:

First. That he admits each and every allegation made in the above-named bill of complaint;

Second. That he is the identical Thomas Marshall, Jr., named in said bill, and that he did, as therein set forth, enter upon the land in question at the time and in the manner therein named, and that he now claims an interest in said land as a pre-empter thereof under and pursuant to the laws of the United States;

Wherefore, he prays the court that his rights as such pre-emptor be saved and protected under any decree which may be entered in this cause, and for such other relief as may be just.

M. H. DUNNELL,
Solicitor for the Defendant Thomas Marshall, Jr.

51 (Title of Cause.)

Agreed Statement.

It is hereby stipulated and agreed by and between the above-named complainants and the above-named defendants, The Winona & St. Peter Railroad Company and The Winona & St. Peter Land Company, for the purposes of the trial of the above-entitled action, as follows:

First. That the allegations of subdivisions 1, 2, 4 and 10, of the bill of complaint herein, are true.

Second. That the tract of land in controversy in this suit lies within the primary or six-mile limits of the grant under the act of Congress approved March 3rd, 1857, under which the Winona & St. Peter Railroad Company is a beneficiary, as alleged in the said bill of complaint.

Third. That the map of definite location of the line and route of road described in the said bill of complaint opposite or past the tract of land in controversy in this suit, was filed in the office of the Commissioner of the General Land Office, July 29th, 1858, and not before.

Fourth. That it appears from the records of the general and proper local land offices of the United States, that one Thomas
52 Marshall, Jr., on the 3rd day of July, 1857, made a pre-emption filing at the United States local land office at Faribault upon the lands in controversy, that being the land district in which said land lies, which alleged settlement on said land on the 30th of June, 1857, which said filing is *prima facie*, regular and valid and that it does not appear from the records of the General Land Office of the United States that the said filing has ever been cancelled.

Fifth. That assuming to act under and pursuant to the act of Congress of March 3rd, 1887, referred to in said bill of complaint, the Secretary of the Interior on the 11th of August, 1891, demanded of said Winona & St. Peter Railroad Company, the relinquishment and reconveyance to the United States of said tract of land, on the ground that the same had been improperly and erroneously certified to the State of Minnesota for its benefit, and was not included in its said grant, and said road refused to comply with said demand.

Sixth. That each and every of the acts of Congress and of the Territory or State of Minnesota referred to in the pleadings herein, the decisions and opinions reported to have been made and delivered by the Secretary of the Interior or the Commissioner of the General Land Office, reported in the "Decisions of the Department of the Interior Relating to Public Lands," may be used upon the hearing of this suit in any court in which it may be pending, so far as the same are relevant to the issues herein, without further proof thereof.

Seventh. That the Secretary of the Interior certified said land to the State of Minnesota on the first day of December, 1862, as
53 land granted to the State under the act of Congress of March 3rd, 1857, for the purpose of aiding in building the line of road of defendant railroad company, and on February 12th, 1867, the State conveyed said land to defendant railroad company by deed, which was on that date duly recorded in the office of the secretary of state, and said defendant railroad company on April 21st, 1876, conveyed said land to the Winona & St. Peter Land Company by deed ——, which was duly recorded on the date of making the same, in Dodge county, Minnesota, that being the county in which said land lies.

Eighth. That before the year 1867, defendant railroad company built its line of road past the land in controversy in this suit, and not until an order to show cause was served on the defendant The Winona & St. Peter Railroad Company by the Secretary of the Interior, May 13th, 1891, why proceedings should not be commenced under said act of Congress of March 3rd, 1887, to restore the title to said tract to the United States, did the United States or any of its officers question the right or title of this defendant railroad company or its grantee, to said land, and after this defendant railroad company had conveyed said land to defendant The Winona & St. Peter Land Company, to wit, on the 1st day of March, 1877, defendant Marshall being in possession and claiming to be the owner thereof, the defendant, The Winona & St. Peter Land Com-

pany, claiming to be the owner of said land, commenced an action of ejectment against defendant Marshall, in the district court of Dodge county, to recover possession of said land, and the court having jurisdiction of the subject-matter, and said Marshall
54 having appeared in said action, such proceedings were had therein *and* it was by the court on the 9th day of December, 1878, considered, held and adjudged that plaintiff recover of said Marshall the possession of such land, from which judgment no appeal was taken, and the same now remains in effect and full force; and in pursuance of said judgment, said defendant Marshall surrendered possession of said land to defendant, The Winona & St. Peter Land Company, and since the rendition of such judgment said Winona & St. Peter Land Company has remained in possession of, and has paid the taxes on said land.

Ninth. That said Marshall has now pending before the Land Department of the United States, an application for reinstatement of his rights to said land, which application has not been acted upon by the department for the reason that it is held by said department that it has no jurisdiction to pass upon such application; that said application was filed in the office of the Commissioner of the General Land Office on the 15th day of November, 1887.

Tenth. That prior to May 22nd, 1891, every available tract designated by odd numbers within the indemnity limits of the grant to the Winona & St. Peter Railroad Company, had been selected by said company on account of such grant, and all such selections and claims under said grant were made prior to the year 1876, except the following:

$157\frac{22}{100}$ acres in the indemnity limits in range 29, selected September 19th, 1877, and certified to the State November 28th, 1881.

40 acres in granted limits in range 28, selected February 9th, 1885.

55 $723\frac{28}{100}$ acres in granted limits in ranges 24, 28, 40 and 43, selected February 9th, 1885.

160 acres in granted limits in range 35, selected July 20th, 1885.

$61\frac{19}{100}$ acres in granted limits in range 34, selected June 17th, 1887. The right of the company to this tract was contested and said land was awarded to the company by the Secretary of the Interior, by his decision of January 2nd, 1890.

40 acres in granted limits in range 41, selected June 17th, 1887.

$6\frac{68}{100}$ acres in granted limits in range 31, selected June 17th, 1887, was after contest awarded to the company by decision of the Commissioner of the General Land Office, November 14th, 1888.

No action has been taken by the Commissioner of the General Land Office or the Secretary of the Interior as to any of said selections, except as above stated, and said selections were, at the time of the bringing of this suit and still are, pending in the Land Department and undisposed of. That as to some of the selections made prior to 1876 no certification of lands has yet been made.

And the list hereto attached, marked Exhibit "X," and made a

part hereof, shows all the land so selected in and prior to 1876, which had not been on March 3rd, 1887, disposed of, and the action taken and had, if any, in reference thereto since that date.

That on the 26th day of February, 1890, Messrs. Britton & Gray, attorneys for said Winona & St. Peter Railroad Company, transmitted to the General Land Office a relinquishment, a copy of which is hereto attached, marked Exhibit "XI," and made
56 a part hereof, of certain lands in said relinquishment described; and accompanying said relinquishment was a letter from said attorneys, a copy of which is hereto attached, marked Exhibit "12*a*," and made a part hereof. Said relinquishment was returned as per letter of the Commissioner dated March 21st, 1890, a copy of which is attached, marked Exhibit "12*b*," and was refiled May 20th, 1890, with letter from said Britton & Gray of that date, a copy of which is attached, marked Exhibit "12*c*."

The lands described in said relinquishment had been erroneously certified to the State of Minnesota for the benefit of the defendant, The Winona & St. Peter Railroad Company, but as to all of said lands valid rights had in other parties become vested before the rights of the said State or said railroad company attached thereto.

Eleventh. That on and before, and for a long time after the year 1879, it was uniformly ruled and held by the Secretary of the Interior and other officers of the Land Department of the United States, that a line of railroad became and was definitely fixed so as to attach the grant to the odd-numbered sections within the granted limits as soon as surveyed and staked out on the face of the earth, and that a pre-emption claim or filing which may have existed to the tract of land at the time of the attachment of the railroad company's grant, if subsequently abandoned or not consummated, even though in all respects legal and *bona fide*, was held not to operate to defeat the grant, but on failure of such claim the land covered thereby was held to enure to the grant as of the date when the grant became effective; and that in accordance with and pursuant to
57 the aforesaid rules, the grants to and for each and all of the land-grant railroad companies in the State of Minnesota were before and for a long time after the year 1879 administered.

Twelfth. That the Transit Railroad Company was a corporation duly created, organized and existing under the laws of the Territory and State of Minnesota, and one of the beneficiaries of the grants of land made by the United States to the State of Minnesota by the act of March 3rd, 1857, herein referred to.

Thirteenth. That the Winona & St. Peter Railroad Company succeeded to all the rights, property, privileges, immunities and franchises of the said Transit Railroad Company, and became one of the beneficiaries of the said act of Congress above referred to, and of the act of Congress approved March 3rd, 1865, granting lands to the State of Minnesota to aid in the building of certain lines of railroad as herein referred to.

Fourteenth. That the Winona & St. Peter Land Company was and is a corporation created by and existing under the laws of the State of Minnesota, authorized to take, hold and convey lands.

Fifteenth. That the said Transit Railroad Company and the defendant, The Winona & St. Peter Railroad Company, were authorized and empowered to build and equip and put into operation a line of road from Winona westwardly via St. Peter, to a point on the Big Sioux river, south of the forty-fifth parallel of north
58 latitude; and the State of Minnesota granted to them all the lands granted by Congress to aid in the building of said line of road.

Sixteenth. That the said Transit Railroad Company surveyed and staked out and fixed its line of road on the face of the earth from Winona westerly to the west line of range 31, on and before the 17th day of July, 1857, and the line so surveyed and staked out was on said day, by resolution of the board of directors of said company, adopted as the line of definite location of said road. That said company filed its map showing the line so surveyed, staked out and adopted as its line of definite location with the Secretary of the Interior of the United States, on the 29th day of July, 1858, and not before.

Seventeenth. It is further stipulated that notwithstanding the stipulation of facts herein made, either party hereto may take such further or additional testimony as to it may seem proper, upon the matters in controversy in this suit.

Eighteenth. That each and every of the matters herein stipulated is subject to an objection thereto that may be made by the party on the ground that it is incompetent, irrelevant or immaterial.

Nineteenth. That prior to October 31st, 1867, Danford N. Barney, Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Charles F. Latham, Ashbel H. Barney, Samuel N. Hoyt and Alfred Hoyt, had loaned and advanced to the said defendant, The Winona & St. Peter Railroad Company, at various times, large sums of money, and had constructed and equipped 105 miles of its road in the
59 State of Minnesota; that on said day, for the purpose of settling and adjusting the indebtedness of said Winona & St. Peter Railroad Company to the said D. A. Barney and his aforesaid associates for money loaned, and for the construction and equipment aforesaid, the said Winona & St. Peter Railroad Company and said Barney and his associates entered into an agreement, a copy of which is hereto attached and marked Exhibit "A."

August 3rd, 1893.

ROB'T G. EVANS,
Sp'l Ass't U. S. Att'y, of Counsel for Complainant.
THOMAS WILSON AND
LLOYD W. BOWERS,
Solicitors for W. & St. P. R. Co.
JAMES A. TAWNEY AND
HENRY M. LAMBERTON,
Solicitors for W. & St. P. Land Co. and Others.

"EXHIBIT A."

Agreement.

Memorandum of an agreement made the 31st day of October, one thousand eight hundred and sixty-seven, by and between Danford N. Barney, Jessie Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Charles F. Latham, Ashbel H. Barney, Samuel N. Hoyt, and Alfred M. Hoyt, parties of the first part, and the Winona & St. Peter Railroad Company, party of the second part.

Whereas, the said parties of the first part have, at and
60 upon the request of the said party of the second part, loaned and advanced large sums of money to the party of the second part, and made, constructed and equipped one hundred and five miles of the railroad of the said party of the second part in the State of Minnesota, and the said party of the second part is indebted to the said parties of the first part in a large sum of money on account thereof:

And whereas, the said parties have agreed upon the terms of liquidation, settlement and payment of all such indebtedness, and the adjustment of the matters between them on the terms hereinafter stated;

And whereas, the said party of the second part hath heretofore issued and delivered to the said parties of the first part its first-mortgage bonds on said road for two millions one hundred thousand dollars, in part payment of such indebtedness;

Now the said party of the second part hath agreed, and doth hereby agree, in further part payment and satisfaction of such indebtedness, to issue to the said parties of the first part four hundred thousand dollars of the full-paid capital stock of its said company, and will also make, execute and deliver to the said parties of the first part twelve hundred and sixty bonds or obligations of the said party of the second part, which said twelve hundred and sixty bonds shall bear date respectively on the first day of November, one thousand eight hundred and sixty-seven, and be for one thousand dollars each, payable in forty years from said date, and bear interest at the rate of seven per centum per annum, payable semi-annually in the city of New York; and that the said twelve hundred and sixty bonds, to be issued as aforesaid, shall be part of a series of
61 eighteen hundred bonds of one thousand dollars each, all of which shall bear interest and be payable as aforesaid, and all of which shall be equally secured by a deed of trust or mortgage, to be executed by the said Winona & St. Peter Railroad Company to Samuel J. Tilden, as trustee, conveying the railroad of the said last-named company from Winona westwardly to the Minnesota river, a distance of one hundred and fifty miles, more or less, as such railroad has been or shall hereafter be constructed, together with the equipments and appurtenances thereof, subject only to the prior lien of a certain other deed of trust or mortgage heretofore

executed by said Winona & St. Peter Railroad Company to H. N. Stockwell and Jesse Hoyt, trustees, to secure the payment of first-mortgage bonds of said last-named company, issued and to be issued to the aggregate amount of three millions of dollars. And it is hereby expressly provided, that the bonds herein agreed to be issued as aforesaid, shall be issued only at the rate of twelve thousand dollars per mile of the portion of the Winona & St. Peter railroad constructed at the time of issuing the same, the distance now constructed, and in respect to which the said twelve hundred and sixty bonds sold or agreed to be sold as aforesaid, shall be issued, being one hundred and five (105) miles. And it being understood and agreed that the remaining five hundred and forty bonds shall be issued only from time to time as the work of constructing said railroad shall progress, at such times and in such manner that the aggregate amount of bonds of the series of eighteen hundred bonds aforesaid, which shall be at any time outstanding, shall not exceed the proportion of twelve thousand dollars per mile of such series of
62 bonds for each mile of the said Winona & St. Peter railroad which shall be at such time constructed.

And whereas, the said party of the second part is or claims to be entitled to have and receive, under the several acts of Congress passed in aid of the construction of the said railroad, a certain number of acres of land, supposed to be about six hundred thousand acres, for constructing the portion of said road now constructed, to wit, one hundred and five miles of railroad:

Now for the residue of the said indebtedness of the said party of the second part to the said parties of the first part, the said party of the second part hath agreed to sell and convey to the said parties of the first part, as many acres of land heretofore granted by Congress to the State of Minnesota, as the said party of the second part shall receive from the said State by reason of the construction of the portion of the Winona & St. Peter railroad heretofore constructed, to wit, one hundred and five miles thereof extending westwardly from Winona, excepting and reserving, nevertheless, any and all parts and parcels of such lands (if any such there be) which may be necessary for the track of said railroad, or the right of way, or any depot or depot grounds thereof, or any other purpose incidental to the operation of the said railroad constructed, or to be constructed, or any part thereof; which said lands hereinbefore agreed to be sold shall be conveyed to the said parties of the first part, or as they shall in writing direct, whenever and as soon as the said party of the second part shall obtain the title thereto under such acts of Congress. The lands to be conveyed as aforesaid shall be selected as follows:

63 Beginning at Winona aforesaid, and from thence proceeding on each side of the said railroad on a course running parallel therewith, and embracing each of the six, ten, fifteen and twenty mile limits of the congressional land grants, and in proceeding taking all lands within each and all of said limits which shall be received by the said company, under said acts of Congress, or either of them; it being understood, that on each side of said rail-

road an uniform line of advance westwardly, embracing all the lands in said limits shall be maintained as nearly as may be, until as many acres shall have been selected and taken as the said company shall have received for the construction of the portion of said railroad now completed, which is estimated to be one hundred and five miles thereof, extending northerly and westerly from Winona aforesaid; it being understood that the said parties of the first part shall receive as many acres as shall be received by the party of the second part for the construction of said one hundred and five miles, or so much thereof as is now constructed, notwithstanding that under the acts of Congress the said lands are certified only upon the completion of sections of not less than ten miles of railroad, but reserving, excepting and deducting from the said number of acres all lands necessary for the track of said railroad, or the right of way, or depots or depot grounds, or other purposes incidental to the operation of said railroad.

And the said party of the second part agrees to acquire the title of said lands as fast as it may be permitted to do under said acts of Congress, and to release and convey to the said parties of the first part,

64 or to such person or persons in such manner, and from time to time, as may be devised by the said parties of the first part, or their counsel, on the request of the said parties of the first part, or a majority of them, and will do any and every other act and thing necessary and proper to secure the said parties of the first part said lands and every part and parcel thereof, and the proceeds thereof, if it shall be hereafter determined that the same shall be sold by the said party of the second part, for the benefit of the said parties of the first part; and until the final arrangements shall be made in reference thereto, the title shall be held by the said party of the second part; and as some time is necessary to enable said parties of the first part to confer and agree upon the details in relation to the holding of the title and the mode of disposing of said lands, this clause is inserted to express the agreement of said parties in relation thereto.

And it is further agreed by and between the parties hereto, that the said parties of the first part shall have and take all the cash assets of the said party of the second part, up to the first day of November, 1867, and that the said parties of the first part shall assume and agree to pay, and that they shall fully pay and discharge all the floating debts of the said party of the second part up to the said first day of November, 1867, and all liabilities thereof to that date, except bonded debt, and including the interest to the said first day of November, 1867, which shall have accrued upon the outstanding bonds of the party of the second part, and which will amount at said date to the sum of forty-nine thousand dollars.

65 And the said parties of the first part hereby covenant, promise and agree, to and with the said party of the second part, that the said parties of the first part shall and will receive and accept the property and things hereinbefore agreed to be transferred to them in full payment, satisfaction and discharge of all

indebtedness of the said party of the second part to the said partie of the first part, or either of them.

And it is hereby further declared and agreed that it shall be optional with the said party of the second part whether or not the said party of the second part shall construct the said railroad to any point beyond that to which it is now completed; but if the said party of the second part shall not, on or before the first day of February, 1869, resolve to undertake the construction of said railroad to the first crossing of the Minnesota river, at or near Mankato, a distance of about twenty-four miles, and notify the said parties of the first part, or some of them, that it will undertake such construction, the said parties of the first part shall then, to wit, from and after the said first day of February, 1869, become entitled and be suffered and permitted, at their own election, to undertake the construction of said road to the said first crossing at or near Mankato aforesaid, and to complete the same within fifteen months from the said first day of February, 1869, at the proper cost and expense of the parties of the first part, but for the use and benefit of the party of the second part, upon the terms following, that is to say: The said party of the second part electing not to construct said railroad to the said first crossing, at or near Mankato aforesaid, and the said parties of the first part, within fifteen months from the said first day of February, 1869, undertaking such construction as
66 aforesaid, the said party of the second part shall issue and deliver to the said parties of the first part, from time to time, as the work of construction shall progress, the first-mortgage bonds aforesaid, at the rate of twenty thousand dollars in amount thereof, and the sinking-fund bonds aforesaid at the rate of twelve thousand dollars in amount thereof, for each mile of the said railroad which shall be constructed by the said parties of the first part as aforesaid, in addition to the one hundred and five miles now completed, until the said railroad shall be completed to the first crossing aforesaid; and upon the completion thereof by the party of the first part to the first crossing aforesaid, provided the same shall be so completed by the first day of May, one thousand eight hundred and seventy, said parties of the first part shall become entitled to receive from the party of the second part the same number of acres of land which the said party of the second part shall receive under the said acts of Congress for the construction of said railroad from the point to which it is now completed to the said first crossing, except such lands as shall be required for railroad purposes, as hereinbefore provided in regard to the one hundred and five miles now constructed; which lands to be conveyed as aforesaid to the parties of the first part, upon the completion of said road by them to the said first crossing, shall be selected in the same manner as hereinbefore provided in respect to the lands hereinbefore agreed to be conveyed to the parties of the first part, or for their benefit, for the construction of said one hundred and five miles; and all the provisions hereof, in respect to the lands which may be received for the construction of the said one hundred and five miles, shall apply to the
67 lands which may be received for the construction of said ad-

ditional twenty-four miles; provided, always, that the said parties of the first part, undertaking the construction of said twenty-four miles, shall construct, complete and equip the same in such a manner that the condition thereof, upon the average, shall be in all respects equal, including equipment, to the average condition of the one hundred and five miles heretofore constructed, with the exception only that the said parties of the first part shall not be obliged to erect elevators thereon.

And provided further, that the said parties of the first part, undertaking the construction of said railroad beyond the point to which it is now completed, and receiving therefor the bonds aforesaid, shall indemnify and save harmless the party of the second part from all costs, charges, expenses, damages and liabilities of such construction.

And it is hereby further declared and agreed, that either party hereto, undertaking the construction of said railroad to the first crossing aforesaid, shall complete the same by the first day of May, one thousand eight hundred and seventy.

And it is hereby further declared and agreed that if the said parties of the first part shall build the said extension of the said railroad to the said first crossing as aforesaid, pursuant to this agreement, the said party of the second part shall allow them to use the tracks of the constructed portions of said railroad to transport, free of charge and by the proper motive power, locomotives, cars and other rolling stock, and the proper agents, employees and servants of the parties of the first part, and at their expense, all materials used in
68 such construction, and all workmen employed in making the same, under and subject to such reasonable rules and regulations in respect to running trains over the said railroad, or any part thereof, as shall be from time to time prescribed by the said party of the second part, or the proper officer or officers thereof. And provided further, that such use of said track shall not impede or interfere with the ordinary business of said railroad; and that the said parties of the first part shall indemnify and save harmless the party of the second part from and against all loss and damage from any cause arising out of the use of said track by the said parties of the first part as aforesaid.

And it is hereby further declared and agreed, that after the completion of the said railroad to the first crossing aforesaid, it shall be optional with the party of the second part whether it shall construct the said railroad from the said first crossing to the second crossing of the Minnesota river, being about twenty-eight miles, more or less (including the bridge over the first crossing); but if the said party of the second part shall not within the period of one year from the completion of said railroad to the first crossing, resolve to undertake the further construction of said road to the second crossing aforesaid, then, to wit, after the expiration of the period of one year from the time of the completion of said road to the said first crossing, the said parties of the first part shall become entitled, and shall for the further period of one year, possess the option, to undertake to construct the said railroad from the said first crossing to the

said second crossing, at the proper cost and expense of the parties of the first part, but for the use and benefit of the
69 party of the second part, upon the terms following, that is to say: The said party of the second part electing not to construct said railroad to the said second crossing, the said parties of the first part, thereupon, within one year from the time of being notified of such election, undertaking the construction thereof, the said party of the second part shall issue and deliver to the said parties of the first part, from time to time, as the work of construction shall progress, the same amount of bonds per mile as hereinbefore provided in respect to the construction of said road to the said first crossing; and all the provisions, conditions and agreements herein contained in respect to the construction of the said road to the said first crossing, so far as the same are applicable, excepting hereinafter otherwise provided, shall apply equally to the construction thereof to the second crossing; and if the said railroad shall be constructed from the first to the second crossing by the parties of the first part as aforesaid, and completed within the period hereinafter mentioned, the said parties of the first part shall thereupon become entitled to receive, from the party of the second part, the same number of acres of land which the said party of the second part shall receive under said acts of Congress for the construction of said road from the said first to the said second crossing; and all the provisions hereof in respect to the lands to be received for the construction of said one hundred and five miles, shall apply to the lands to be received for the construction of said railroad from the first to the second crossing.

And it is hereby further declared and agreed, that either
70 party undertaking the construction of said road from the first to the second crossing, shall complete the same within three years from the time of the completion of the said road to the said first crossing.

And it is further understood and agreed, that if the said parties of the first part shall undertake the construction aforesaid, they shall, if the party of the second part shall so elect, construct the said railroad to a point on the northerly side of the Minnesota river which the said party of the second part shall designate, and which shall not be more than twenty-eight miles distant from the said first crossing, with the same effect, so far as the provisions of this agreement are concerned, as if such party constructed the same to the said second crossing; provided such construction to said point be made within the same time and in the same manner as hereinbefore provided in respect to the construction to the said second crossing.

And the said party of the second part further agrees, in consideration aforesaid, that it will not, at any time hereafter, encumber by mortgage or otherwise the said lands hereinbefore described, and which, by the terms of this agreement, are to be conveyed to the parties of the first part, or as they shall direct.

And the said parties of the first part further agree, that all the expenses of procuring title to such lands, and the expenses of any

and all conveyances which shall be made of said lands, shall be paid by the parties of the first part.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, and the said party of the second part has caused its corporate seal to be hereunto annexed, and the
71 same to be attested by the signatures of its president and treasurer, the day and year first above written.

(Signed) D. N. BARNEY. [SEAL.]
WM. G. FARGO. [SEAL.]
ANGUS SMITH. [SEAL.]
ALFRED M. HOYT. [SEAL.]
SAMUEL N. HOYT,
By A. M. HOYT, *Att'y.* [SEAL.]
A. H. BARNEY. [SEAL.]
BENJ. P. CHENEY,
By A. H. BARNEY, *Att'y.* [SEAL.]
C. F. LATHAM,
By D. N. BARNEY, *Att'y.* [SEAL.]
JESSE HOYT.
WINONA AND ST. PETER RAILROAD COMPANY,

[W. & St. P. R. R. Co. Seal.]

By GEO. L. DUNLAP, *President.*

Sealed and delivered in the presence of—
CHARLES NETTLETON.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on the eighteenth day of December, A. D. one thousand eight hundred and sixty-seven, before me, the undersigned, Charles Nettleton, a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the State of Minnesota, to take the acknowledgment of deeds, &c., to be used or recorded therein, personally appeared Danford N. Barney, William G. Fargo,
72 Angus Smith, Alfred M. Hoyt and Ashbel H. Barney, personally to me known to be five of the same persons described in and who executed the foregoing instrument of writing, and severally acknowledged to me that they had executed the same as their and each of their free and voluntary act and deed in their own behalf, and for the uses and purposes therein mentioned; and on the same day also before me again personally appeared the said Alfred M. Hoyt, personally known to me to be the attorney-in-fact of Samuel N. Hoyt, one of the persons described in and who executed the foregoing instrument of writing by said attorney, and the said Alfred M. Hoyt acknowledged to me that he had, as such attorney, executed the same instrument as the free and voluntary act and deed of the said Samuel N. Hoyt, and for the uses and purposes therein mentioned; and on the same day also before me again per-

sonally appeared the said Ashbel H. Barney, personally known to me to be the attorney-in-fact of Benjamin P. Cheney, one of the persons described in and who executed the foregoing instrument of writing, by his said attorney, and the said Ashbel H. Barney acknowledged to me that he had as such attorney executed the same instrument as the free and voluntary act and deed of the said Benjamin P. Cheney, and for the uses and purposes therein mentioned; and on the same day also before me again personally appeared the said Danford N. Barney, personally known to me to be the attorney-in-fact of Charles F. Latham, one of the persons described in and who executed the foregoing instrument in writing by his said attorney, and the said Danford N. Barney acknowledged to me that he had as such attorney executed the same instrument as the
73 free and voluntary act and deed of the said Charles F. Latham, and for the uses and purposes therein mentioned.

And on the same day also before me personally appeared George L. Dunlap, to me personally known to be the president of the Winona and St. Peter Railroad Company, described in and who executed the foregoing instrument of writing by said George L. Dunlap, as president, and the said George L. Dunlap being by me duly sworn, according to law, did depose and say, that he resided in the city of Chicago, county of Cook, State of Illinois; that he was president of the said Winona and St. Peter Railroad Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument, purporting to be the seal of said company, was such corporate seal; that it was so affixed by order of the board of directors of said railroad company, and that he signed his name thereto by the like order as president of said company; and he also acknowledged to me that he had executed the said instrument as the free and voluntary act and deed of the said Winona and St. Peter Railroad Company, for the uses and purposes therein mentioned.

And on this sixth day of January, A. D. one thousand eight hundred and sixty-eight, also before me personally appeared Jesse Hoyt, personally to me known to be one of the same persons described in and who executed the foregoing instrument of writing, and he acknowledged to me that he had executed the same as his free and voluntary act and deed, and for the uses and purposes therein mentioned.

74 In witness whereof, I have hereunto set my hand and affixed my official seal, this 6th day of January, A. D. 1868.

[SEAL.] (Signed) CHARLES NETTLETON,
Commissioner for Minnesota in New York.

EXHIBIT X.

Listings and selections of land made on account of the Winona and St. Peter Railroad grant prior to and during the year 1876, upon which final action had not been taken March 3, 1887, with the present status of the tracts.

Primary or Granted Limits.

W. ½, S. W. ¼, 5, 108, 32:

April 5, 1886, Commissioner holds land excepted from grant. Appealed to Secretary of Interior and cases transmitted August 10, 1886.

S. E. ¼, 31, 109, 32:

April 5, 1886, Commissioner holds land excepted from grant appealed to Secretary of Interior and case sent up from August 10, 1886.

S. E. ¼, 21, 109, 33:
E. ½ S. E. ¼, 27, 109, 33:
E. ½ S. W. ¼, W. ½ S. E. ¼, 27, 109, 33:

June 10, 1887, Comm'r decided against the company. Filed appeal to Secretary July 26, 1887.

75 S. W. ¼, 5, 108, 35:

Home. 983—Henry Patsche, March 1, 1864, Canc. Dec. 17, 1873, expired. Timber-culture entry 1852, Carl Albert Hagberg—Cancelled Jan. 10, 1887, relinquished. Home. 11668, Fridrik Sydow, Jan. 10, 1887, final certificate 6962, July 1, 1892.
Railroad listing held for cancellation, Jan'y 12, 1893.

S. W. ¼, 25, 109, 35:

Listed by company, July 16, 1885, susp'd for old claims as follows:
D. S., Henry D. Tenny, Feb. 26–27, 1864.
D. S., Michael White, July 13–15, 1871.

N. E. ¼, 19, 109, 36:

Homestead 1081, cancelled Dec. 17, 1873—(Expired). Eugene L. Hempel, March 22, 1864.
Homestead 12074, Calista Bennett, Feb. 23, 1891. Canc. May 30, 1891. (Relinquished.)
Homestead 12124—Charley Roth, May 30, 1891 (Intact.) Case 4—3115—Closed against company, Feb. 16, 1891.

S. ½ S. W. ¼, 19, 109, 36:

D. S. 16974—Peter Zeno—Dec. 15, 1857, Feb. 9, 1859.
Hd. 11653—Ferdinand L. Behnke, Oct. 13, 1886.
Final 6850, Dec. 2, 1891.
Case 4—3118—Closed in favor of company, June 29, 1888.

Lot 1, 19, 107, 38:

Selected May 23, 1872. In 15-mile limits of St. P. & S. C.

76 N. E. ¼, 7, 108, 32:

Claims of company rejected by Commissioner April 5, 1886. Appealed to Secretary of the Interior.

S. ½ S. E. ¼, 7, 109, 32:

April 5, 1886, Commissioner decided land excepted from grant—Appealed to Secretary of Interior.

W. ½ S. E. ¼, E. ½ S. W. ¼, 17, 109, 34:

April 5, 1886, Commissioner decided land excepted from grant—Appealed to Secretary of the Interior.

N. ½ N. E. ¼, S. W. ¼, N. E. ¼, 27, 109, 33:

March 15, 1887, Commissioner decided land to be excepted from grant—Appealed to Secretary of Interior.

Lot 2, 31, 111, 31:

Application of company to list said tract rejected by local officers because of supposed cash application Mar. 10, 1886, of Louis Buchard, June 29, 1887, filed appeal to Commissioner.

Secondary or Indemnity Limits.

Lot 5, 9, 107, 42:

Hd. 1173—Cyrus S. Bowman, April 23, 1864. Cancelled July 20, 1866.
D. S. 18778—Bartlett M. Lowe, July 16—Aug. 4, 1864. Wt. 105,745—1855—160 acres—Bartlett M. Lowe, June 25, 1867.

N. E. ¼, N. W. ¼, 9, 108, 42:

Selected May 23, 1872. Suspended because supposed to be approved as swamp—caused by error in tract book; the N. E. ¼ N. E. ¼ was approved as swamp, July 26, 1887, to Commissioner asking him to approve land to company.

77 N. W. ¼ S. E. ¼, 11, 113, 41:

Selected May 23, 1872. Suspended because supposed to have been approved as swamp—caused by error in records—the S. W. ¼ S. E. ¼ was approved as swamp, July 18, 1887, to Commissioner asking approval of tract to company.

Selections under Act June 22, 1874.

S. E. ¼ N. E. ¼, 6, 110, 39, in lieu of S. E. ¼ N. W. ¼, 3, 104, 24:

S. ½ S. E. ¼, 12, 110, 39, in lieu of S. W. ¼ N. W. ¼, N. W. ¼ S. W. ¼, 5, 109, 44:

E. ½ N. W. ¼, S. ½ N. E. ¼, 30, 111, 37. In lieu of N. ½ N. E. ¼, E. ½ N. W. ¼, 13, 111, 28:

In contest with Americus W. Wilcox and F. L. Warner. Commissioner decided against company. Appealed to Secretary of Interior.

E. ½ S. E. ¼—2, 108, 37:

Seclected Aug. 7, 1876,—cancelled Sept. 12, 1890.

Subsequent selection, on same basis, approved June 6, 1879. Hd. 11178—Elling Ellington, Apr. 13, 1882. Final certificate 6094, Dec. 21, 1888.

E. ½ N. W. ¼, 18, 112, 42:

E. ½ N. W. ¼ 18 and N. ½ N. E. ¼, 30.—Selected July 31, 1876, in lieu of S. W. ¼, 23—111—42. Approved as to N. ½ N. E. ¼—30, March 17, 1877.

S. E. ¼ S. E. ¼,—18—105—21:

Selected Aug. 9, 1876.—Cancelled March 12, 1892. Subsequent lieu selection of S. E. ¼ N. E. ¼—6—110—39, on same base,—cancelled March 12, 1892.

78 EXHIBIT XI.

This is to certify that the Winona and St. Peter Railroad Company does hereby release and relinquish to the United States of America the following-described lands, all lying west of the fifth principal meridian, to wit:

Subdivision.	Section.	Town.	Range.	Area. Acres.	Area. 100ths.
S. E. ¼ of N. E. ¼	11	105	9	40	
S. E. ¼ of S. E. ¼	13	105	9	40	
N. E. ¼ of N. E. ¼	11	105	11	40	
E. ½ of N. E. ¼, N. W. ¼ of N. E. ¼, and N. E. ¼ of S. E. ¼	25	107	11	160	
S. W. ¼	27	107	11	160	

Exhibit XI—Continued.

	Subdivision.	Section.	Town.	Range.	Area. Acres.	Area. 100ths.
	E. ½ of N. E. ¼	23	108	11	80	
	S. W. ¼ of N. E. ¼ and N. W. ¼ of S. E. ¼	27	107	12	80	
	N. W. ¼ of S. W. ¼	15	106	14	40	
	N. W. ¼	11	107	14	160	
	S. W. ¼ of N. E. ¼ and N. W. ¼ of S. E. ¼	27	106	16	80	
	N. E. ¼	23	106	17	160	
	Und. ½ of W. ½ of N. W. ¼	19	106	18	38.92	
	Und. ½ of S. E. ¼ of N. W. ¼	17	107	20	20	
	Und. ½ of N. ½ of S. W. ¼	23	106	22	40	
	N. E. ¼ of N. E. ¼	19	108	22	40	
	N. W. ¼ of N. E. ¼	27	107	23	40	
	S. W. ¼ of N. W. ¼	19	108	23	35.08	
	S. E. ¼ of S. W. ¼	25	109	24	40	
	Lot 6	33	109	25	57	
79	Lot 1 and S. W. ¼ of N. E. ¼	19	110	25	39.99	
	Und. ½ of N. E. ¼	29	110	25	80	
	Und. ½ of S. ½ of N. E. ¼	15	109	26	40	
	Und. ½ of N. E. ¼ of S. E. ¼	7	110	26	20	
	Und. ½ of E. ½ of N. W. ¼ and S. W. ¼ of N. W. ¼	7	111	27	57.94	
	Und. ½ of N. W. ¼ of N. W. ¼	7	111	27	17.91	
	Und. ½ of S. ½ of N. E. ¼ and N. ½ of S. E. ¼	13	111	28	80	
	N. E. ¼ of N. W. ¼	19	109	29	40	
	E. ½ of N. E. ¼ and N. W. ¼ of N. E. ¼	21	109	29	120	
	S. ½ of S. W. ¼	11	110	29	80	
	Lot 4	17	110	29	58.60	
	S. W. ¼	21	110	29	160	
	Lot 1	3	109	30	1.64	
	S. E. ¼	7	109	30	160	
	N. ½	9	109	30	320	
	N. ½ and S. E. ¼	17	109	30	480	
	N. ½ of N. W. ¼ and S. ½ of S. E. ¼	21	109	30	160	
	E. ½ of N. W. ¼	29	109	30	80	
	Lot 1	21	110	30	2.50	
	E. ½ of S. E. ¼, S. W. ¼ of S. E. ¼ and S. E. ¼ of S. W. ¼	35	110	30	160	
	S. W. ¼ of S. E. ¼	31	111	30	40	
	Lots 4, 12, 13, 14 and 15	19	111	31	206.94	
	N. W. ¼	21	111	31	160	
80	W. ½ and S. ½ of S. E. ¼	27	111	31	400	

Exhibit XI—Continued.

Subdivision.	Section.	Town.	Range.	Area. Acres.	Area. 100ths.
S. ½ of N. E. ¼, N. ½ of S. E. ¼ and S. ½ of S. W. ¼	29	111	31	240	
S. E. ¼ and lots 3, 4, 13, 14, 19 and 20	31	111	31	382.25	
Lots 1, 7 and 8	33	111	31	128.27	
N. W. ¼	35	111	31	160	
S. W. ¼ of S. E. ¼	35	108	40	40	

Total 5,267.04 acres.

In witness whereof the said Winona and St. Peter Railroad Company has hereunto caused its corporate seal to be affixed and these presents to be signed by its president and attested by its secretary, this fifth day of February, A. D. one thousand eight hundred and ninety.

WINONA AND ST. PETER RAILROAD COMPANY,
By MARVIN HUGHITT, *President.* [SEAL.]

Attest: J. B. REDFIELD, *Secretary.*

Approved:

C. E. SIMMONS,
Land Commissioner.

In presence of—

——— ———.

STATE OF ILLINOIS, *Cook County,* } ss:

On this fifth day of February, A. D. 1890, before me ap-
81 peared Marvin Hughitt, to me personally known, who being by me duly sworn did say, that he is the president of the Winona and St. Peter Railroad Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said Marvin Hughitt acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and seal of office the day and year last above written.

[SEAL.] FRANK P. CRANDON,
Commissioner in and for the State of Illinois, Appointed by the Governor of the State of Minnesota to Take the Acknowledgment of Deeds and Other Instruments in Writing to be Used in said State of Minnesota.

STATE OF ILLINOIS, } ss:
Cook County, }

Charles E. Simmons, being duly sworn, deposes and says, that he is the land commissioner of the Winona and St. Peter Railroad Company; that as such land commissioner he is the custodian of the records and files of said railroad company relating to the ownership of the lands granted by the United States to the State of Minnesota to aid in the construction of said railroad; that he has carefully examined the records of said railroad company so in his custody as aforesaid and that it appears from said records that the said Winona and St. Peter Railroad Company has never sold or otherwise disposed of any of the tracts of land described in the attached deed or release from the said railroad company to the United States
82 of America, bearing date the fifth day of February, 1890, except by the aforesaid release.

CHARLES E. SIMMONS,
Land Commissioner, Winona and St. Peter Railroad Company.

Subscribed and sworn to before me, a notary public in and for said Cook county and State of Illinois, this 12th day of May, 1890.

[SEAL.] J. F. CLEVELAND,
Notary Public.

Winona and St. Peter Railroad Company.

At a meeting of the directors of the Winona and St. Peter Railroad Company held in Chicago, Illinois, February 7, 1890, at which a quorum of the directors was present, a resolution was unanimously adopted as follows, to wit:

Resolved, That the president be and he is hereby authorized to execute under the seal of the company and deliver to the United States a relinquishment of the following-described lands, to wit:

Subdivision.	Section.	Town.	Range.	Area. Acres.	Area. 100ths.
S. E. ¼ of N. E. ¼	11	105	9	40	
S. E. ¼ of S. E. ¼	13	105	9	40	
N. E. ¼ of N. E. ¼	11	105	11	40	
E. ½ of N. E. ¼, N. W. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼	25	107	11	160	
S. W. ¼	27	107	11	160	
83 E. ½ of N. E. ¼	23	108	11	80	
S. W. ¼ of N. E. ¼ and N. W. ¼ of S. E. ¼	27	107	12	80	
N. W. ¼ of S. W. ¼	15	106	14	40	
N. W. ¼	11	107	14	160	
S. W. ¼ of N. E. ¼ and N. W. ¼ of S. E. ¼	27	106	16	80	
N. E. ¼	23	106	17	160	
Und. ½ W. ½ of N. ¼	19	106	18	38.92	
Und. ½ S. E. ¼ of N. W. ¼	17	107	20	20	
Und. ½ N. ½ of S. W. ¼	23	106	22	40	
N. E. ¼ of N. E. ¼	19	108	22	40	
N. W. ¼ of N. E ¼	27	107	23	40	
S. W. ¼ of N. W. ¼	19	108	23	35.08	
S. E. ¼ of S. W. ¼	25	109	24	40	
Lot 6	33	109	25	57	
Lot 1 and S. W. ¼ of N. E. ¼	19	110	25	39.99	
Und. ½ N. E. ¼	29	110	25	80	
Und. ½ S. ½ of N. E. ¼	15	109	26	40	
Und. ½ N. E. ¼ of S. E. ¼	7	110	26	20	
Und. ½ E. ½ of N. W. ¼ and S. W. ¼ of N. W. ¼	7	111	27	57.94	
Und. ½ N. W. ¼ of N. W. ¼	7	111	27	17.91	
S. W. ¼	29	106	28	160	
Und. ½ S. ½ of N. E. ¼ and N. ½ of S. E. ¼	13	111	28	80	
N. E. ¼ of N. W. ¼	19	109	29	40	
E. ½ of N. E. ¼ and N. W. ¼ of N. E. ¼	21	109	29	120	
84 S. ½ of S. W. ¼	11	110	29	80	
Lot 4	17	110	29	58.60	
S. W. ¼	21	110	29	160	
Lot 1	3	109	30	1.64	
S. E. ¼	7	109	30	160	
N. ½	9	109	30	320	
N. ½ and S. E. ¼	17	109	30	480	
N. ½ of N. W. ¼ and S. ½ of S. E. ¼	21	109	30	160	
E. ½ of N. W. ¼	29	109	30	80	
Lot 1	21	110	30	2.50	

Subdivision.	Section.	Town.	Range.	Area. Acres.	Area. 100ths.
E. ½ of S. E. ¼, S. W. ¼ of S. E. ¼ and S. E. ¼ of S. W. ¼	35	110	30	160	
S. W. ¼ of S. E. ¼	31	111	30	40	
Lots 4, 12, 13, 14 and 15	19	111	31	206.94	
N. W. ¼	21	111	31	160	
W. ½ and S. ½ of S. E. ¼	27	111	31	400	
S. ½ of N. E. ¼, N. ½ of S. E. ¼ and S. ½ of S. W. ¼	29	111	31	240	
S. E. ¼ and lots 3, 4, 13, 14, 19 and 20	31	111	31	382.25	
Lots 1, 7 and 8	33	111	31	128.27	
N. W. ¼	35	111	31	160	
S. W. ¼ of S. E. ¼	35	108	40	40	

Total, 5,427.04 acres.

I, J. B. Redfield, secretary of the Winona and St. Peter Railroad Company, do hereby certify that the foregoing is a true and
85 correct copy of a resolution adopted by the board of directors of the Winona and St. Peter Railroad Company as stated above.

Witness my hand and the corporate seal of said company, this 7th day of February, 1890.

[SEAL.] J. B. REDFIELD, *Secretary.*

EXHIBIT XII*a*.

FEBRUARY 26, 1890.

Hon. Lewis A. Groff, Commissioner of the General Land Office.

SIR: Referring to the return heretofore filed by us in behalf of the Winona & St. Peter Railroad Company on the rule to show cause why a certain adjustment made by you is not satisfactory, we enclose herewith quitclaim deed from said company to the United States of 5,427.04 acres of land, which are more particularly discussed therein. This quitclaim deed was inadvertently omitted from our return of February 20, last.

Very respectfully, BRITTON & GRAY,
Att'ys W. & St. P. R. R.

EXHIBIT XII*b*.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 21, 1890.

Messrs. Britton & Gray, att'ys W. & St. P. R. R. Co.

GENTLEMEN: Referring to your letter of February 26, 1890, in the matter of the adjustment of the grant for the Winona and St. Peter R. R. Co., enclosing a quitclaim deed from said company to the United States of 5,424.04 acres, and requesting that credit
86 be given for same in the adjustment, I have to advise you that there is no evidence to show that the company had not parted with its title prior to the execution of said quitclaim deed. Such evidence will be necessary before credit can be given.

The S. W. ¼ of section 29, township 106 north, range 28 west, for 160 acres, is included in said release.

This tract is not within the limits of the grant for said company; further, it is shown to have been approved to the State August 26, 1864, on account of the grant for the Southern Minnesota railroad.

Very respectfully, LEWIS A. GROFF,
Commissioner.

EXHIBIT XII*c*.

MAY 20, 1890.

Hon. Commissioner of the General Land Office.

SIR: Referring to office letter "F" of 8th inst., we return herewith relinquishment by the Winona & St. Peter Railroad Company of 5,267.04 acres of land therein more specifically described, in favor of the United States, and have attached thereto the required affidavit of non-alienation.

We respectfully request that in the adjustment of said company's grant, due credit be given for this land relinquished, and that receipt of this letter may be acknowledged.

Very respectfully, BRITTON & GRAY,
Att'ys W. & St. P. R. R. Co.

87 (Title of Cause.)

Evidence.

H. M. LAMBERTON, called and sworn on the part of the complainant, testified as follows:

By Mr. KEITH:

Q. Mr. Lamberton, are you one of the officers of the defendant, The Winona & St. Peter Land Company?

A. I am land commissioner.

Q. How long have you been land commissioner?

A. Since the organization of the company in 1876; since the organization of the company; I think it was in 1876.

Q. Prior to the organization of the land company, were you in any way connected with the defendant, The Winona & St. Peter Railroad Company?

A. Yes, sir; I was land commissioner prior to that time for several years.

Q. Were you land commissioner for the Winona & St. Peter Railroad Company from its organization?

A. No, sir; in 1866 I was appointed land commissioner.

Q. Did you continue to be land commissioner for the Winona & St. Peter Railroad Company until you became land commissioner for the Winona & St. Peter Land Company?

A. I don't think I did; for three or four years——

Q. You are a resident of Winona?

A. Yes, sir.

Q. These two companies have their principal place of business in Winona?

88 A. No; the railroad company have their principal place of business there and the land company have their principal place of business in Chicago.

Q. The land company has an office in Winona?

A. Yes; they have an office in Winona.

Q. Were you connected with the defendant, The Winona & St. Peter Railroad Company, at the time of making the contract between that company and Danford Barney?

A. I was; that was in October, 1867.

Q. Is this a correct copy of that contract?

A. It is a copy; yes, sir.

It is agreed by counsel present that said copy is a correct copy and may be marked Exhibit 1, and which will be attached to this deposition.

Q. Was the Winona & St. Peter Land Company organized by Barney and his associates?

A. Yes, sir.

Q. Do you know whether the provisions of this contract, Exhibit 1, have been carried out by the Winona & St. Peter Railroad Company, by conveyance as therein provided, of land?

A. I believe it has.

Q. To whom has it been conveyed?

A. The railroad company conveyed a great many tracts to different purchasers of the land—to whom the land was sold prior to the organization of the land company—and after that time a large part was conveyed to the land company. I am not positive but what some tracts was also conveyed to settlers.

Q. But the land that was conveyed to the land company was conveyed as provided in the contract?

89 A. The contract provides that the land shall be conveyed on the request of Barney and his associates, and I am not positive that all of it was conveyed to them, but that some of it was conveyed to settlers.

Q. The railroad company has conveyed land, at the request of Barney and his associates, to individuals?

A. Yes, sir.

Q. There has been some litigation between these two companies?

A. Yes, and the last lands were conveyed under order of the circuit court of the United States for this district.

Q. Was there any other consideration for conveyances by the railroad company for land to the land company and those to whom Barney and his associates requested it might be conveyed to directly other than as stated in this contract?

A. That I cannot state; I don't know whether there was any consideration or not. The deeds were executed in New York. I was not present when they were executed.

Q. Did you receive these deeds after they were executed?

A. Yes, sir; they came to me as land commissioner. The custom would be that I would prepare the deed or have it prepared in my office and forward it to New York to Barney, and the deed would be furnished by him executed by the officers of the Winona & St. Peter Land Company.

Q. So far as you know, was there any other consideration? For the conveyance of land by the Winona & St. Peter Railroad Company to individuals?

A. That I cannot answer; I don't know.

90 Q. Do you know that there was not?

A. No, I don't. I don't know that it was not.

Q. Were these conveyances that were executed by the Winona & St. Peter Railroad Company quitclaim deeds or what?

A. A portion of them were special warranty deeds; to the lands conveyed under order of court quitclaim deeds.

Q. How large a portion of the lands were conveyed under order of the court growing out of this litigation?

A. Do you mean——

Q. I am including the lands in controversy.

A. Two-fifths I should say of the lands were conveyed under order of the court.

Q. Do you know when the conveyance was made by which this land in controversy was conveyed?

A. No; I think it was a deed of special warranty; I have forgotten. I think it was conveyed prior to the order of the court.

Q. I understood you to say that the Winona & St. Peter Land Company was organized by Barney and his associates?

A. They were the principal stockholders.

Q. Has the land company any interest or claim to the quarter section in controversy in this suit, other than it has acquired by virtue of its substitution in the place of Barney and his associates upon the organization of this land company?

Counsel for the Winona & St. Peter Railroad Company objects to this question for the following reasons:

91 1st. That it assumes that the Winona & St. Peter Land

Company was substituted for Barney and his associates as mentioned in this contract Exhibit 1.

2nd. That it is not the best evidence who were the parties interested in the Winona & St. Peter Land Company; that it is provable by the record and not by parole in this way.

3rd. This witness has before stated that Barney and his associates were the principal stockholders in the Winona & St. Peter Land Company and it has in no place been shown that they were the entire stockholders.

A. The only knowledge I have of any interest is the conveyance by the railroad company to the land company.

Q. Has the Winona & St. Peter Land Company in its possession any instrument or assignment from Barney and others under this contract?

A. I do not know. There is no assignment in my office, but there may be in New York, but I can't say; but my impression is that the lands were conveyed as provided in the contract on request of Barney and his associates.

The counsel for the Winona & St. Peter railroad moves to strike out this part of this answer which states this witness's impression of the facts as he has stated.

Q. Do you know what the course of dealing was between the land company and the railroad company by which the railroad company from time to time made conveyances to the Winona & St. Peter Land Company? Was it upon request of Barney and his associates under this contract or otherwise?

92 A. I can only say that I prepared deeds and they were forwarded to Barney in New York.

Q. You prepared them and forwarded them to Barney?

A. Yes, sir.

Q. Was he the same Barney mentioned here?

A. It was A. H. Barney.

Q. These deeds that you say you prepared running to the land company and forwarded to Barney were prepared by you and together examined by the railroad company.

A. They were sent to Barney after examination.

Q. Were you requested by Barney to make these various deeds for examination by the railroad company?

A. I think so.

Q. And upon this request you would prepare these deeds and send them on to him as you have testified?

A. Yes, sir.

Q. Do you know whether you prepared the deed for execution by the railroad company in which this quarter section in controversy was included?

A. It was prepared in my office; under my direction.

Q. Did Mr. Barney request that you prepare it?

A. Not especially; just the same as the other lands.

Q. I mean you prepared the deed under which that particular tract of land was conveyed at the request of Barney?

A. I believe it was; all the lands.

93 Q. That deed was forwarded to Barney by the railroad company?

A. Yes, sir; that is my recollection; all of the lands.

Q. Was that deed returned to you executed by Barney?

A. By the railroad company it was.

Q. That deed was executed by the railroad company to the land company, and that deed, including the Marshall land, was conveyed prior to the order of the court here in the litigation between these two companies?

A. I think it was long before that; some years before this litigation was disposed of.

On cross-examination by counsel for the Winona & St. Peter Railroad Company the witness testified:

By Judge THOMAS WILSON:

Q. You have been asked, Mr. Lamberton, by the counsel for the United States, whether there was any consideration save that mentioned in this contract, Exhibit 1, for the deeds made in pursuance of that to the persons indicated by Barney and his associates; now let me refresh your memory and ask you whether as a rule in such cases the persons to whom these deeds were made should buy and purchase their lands at their full value.

Objected to as incompetent, irrelevant and immaterial and no foundation laid.

A. I will state that I am familiar with the rule and that the lands were paid for at what I believe to be the full market value.

94 By COUNSEL FOR UNITED STATES: I move to strike out the latter part of that answer as not responsive and no foundation laid for the answer.

Q. You say, Mr. Lamberton, that of your knowledge, that was the ordinary rule in such cases?

A. Yes, sir.

Same objection.

Q. I understood you to say in your direct examination that Mr. Barney and his associates mentioned in this contract, Exhibit 1, were the principal stockholders in the Winona & St. Peter Land Company?

A. Yes, sir.

Q. Do you know whether there were or were not other stockholders or incorporators in that land company?

A. There were.

Q. Did or did not the principal stockholders of that land company live in the city of New York?

Objected to as incompetent, irrelevant and immaterial and not cross-examination.

A. They lived in New York, Boston and Buffalo.

Q. Did or did not the financial officer and the first vice-president of the Winona & St. Peter Railroad Company also live in New York?

Objected to as incompetent, irrelevant and immaterial.

A. He did.

Q. Of your knowledge, was or was not the first vice-president of the Winona & St. Peter Railroad Company and its principal officer who lived in New York and this A. H. Barney well acquainted?

Same objection.

95 A. They were.

Q. As to the contract made between the Winona & St. Peter Railroad Company and the Winona & St. Peter Land Company, have you any personal knowledge about that?

A. I have not.

Q. As to the amount of interest of the stockholders or incorporators of the Winona & St. Peter Land Company that were not also mentioned in this contract, Exhibit A 1, do you know what the extent of their interest was of your own knowledge?

A. I cannot say.

Same objection.

Q. The deeds that were made by the Winona & St. Peter Railroad Company to the several persons indicated by Barney and his associates were put on record, were they not, in the counties in which the land lay?

A. I believe they were.

Q. At or about the time these deeds were made?

A. The deeds were delivered to the parties first and I don't know when.

Q. Do you or do you not know whether the parties making these purchases thereafter moved upon these lands and improved them?

Objected to as incompetent, irrelevant and immaterial.

A. That is my belief and understanding.

Q. You may state whether you were familiar with the course pursued in such cases.

Same objection.

96 A. So much so that I would sell only to actual settlers and to those only who would improve the lands. That was our rule. If there was any speculation the company would hold it.

Redirect examination:

Q. I think I failed to ask you whether there was any consideration given from the Winona & St. Peter Land Company to the

Winona & St. Peter Railroad Company for the execution and delivery of the deed by which the Marshall tract was conveyed other than provided in this contract, if you know of your own knowledge?

A. I have stated distinctly that I do not know.

Q. You do not know that there was not other consideration?

A. The contract was made in New York city, and I was not there, so I don't know.

Q. Now you have stated in your reply to the question of counsel something as to the general rule in cases of conveyances; do you refer in that answer to conveyances made to individuals to whom land was by Barney and his associates requested to be conveyed or to conveyances made as well to the Winona & St. Peter Land Company?

A. I refer to lands conveyed to individuals and distinct tracts paying full consideration, as I believe.

Q. The conveyances then that you refer to as being made upon the payment or part payment by the grantees were individual conveyances?

A. I am more familiar with them.

Q. The consideration in such cases to individual purchasers to whom Barney requested conveyance should be made, their
97 conveyance was where the consideration was made at the time of the delivery of the deed?

A. Upon final payments.

Q. The conveyances made at Barney's request by the Winona & St. Peter Railroad Company to the Winona & St. Peter Land Company had been paid for in advance?

Objected to by counsel for the Winona & St. Peter railroad, the same being not only leading but suggesting to his own witness the answer which he seeks to obtain.

A. I cannot say; I cannot answer that question of my own knowledge.

Q. Do you know that at the time of making this conveyance by the railroad company to the land company at Barney's request whether consideration was then paid? When the deed was delivered?

A. I have no personal knowledge of this; the deeds were forwarded to New York and returned to me executed.

Q. But as to what transpired in consideration for deeds made by the land company to individuals you are advised that there was a consideration paid at the time of delivery of the deed?

A. Yes, sir; or prior thereto.

Q. But when you speak of the consideration of the individuals having been made prior to the sending of the deed, you mean, I suppose, that when the final payment was made that the deed would be sent for?

A. Was when the full consideration for which the land was sold had been paid.

98 Recross-examination:

Q. As to the sales of lands to individuals to which you have referred, is it not true that you made these sales yourself and knew just what was paid on the sale?

A. That is, I made the sales, or they were made under my direction, and I knew how the payments were made.

Q. As to these deeds made to the land company, I understand you to say that you do not know what the consideration paid in this contract was?

A. That is right.

Q. I further understand you to say, and I ask if this is correct, that the officers of the land company and the financial officer of the Winona & St. Peter Railroad Company lived in New York city?

A. They did.

Q. And they were personally well acquainted?

A. Yes, sir.

Same objection.

It is agreed that Exhibit 1 hereinbefore referred to is the same as Exhibit "A" attached to the agreed statement of fact in this cause.

THOMAS MARSHALL, JR., being duly sworn, testified as follows:

By Mr. EVANS:

Q. Your name is Thomas Marshall, Jr.?

A. Yes, sir.

Q. You are the same Thomas Marshall who is defendant in this suit, the title of which you heard me read just now?

A. Yes, sir.

99 Q. Where do you live, Mr. Marshall?

A. Minneapolis.

Q. How long have you lived there?

A. About 11 years.

Q. You know the land in controversy in this suit, to wit, the northeast quarter (N. E. ¼), section 35, town. 106, N. range 18 west, situate in Dodge county, Minnesota?

A. Yes, sir.

Q. How long have you known it?

A. Since June, 1857.

Q. How do you come to know this land, Mr. Marshall, did you have anything to do with it at that time?

A. We moved from Wisconsin into Minnesota to take up land and settled on that land in June, 1857.

Q. To take up land, how?

A. Under the pre-emption laws of the United States.

Q. And you moved on this land in June, 1857?

A. Yes, sir.

Q. For what purpose did you move on it?

A. For settlement and to occupy it—and farm it.

Q. Did you afterward do any act respecting this land to obtain title to it?

A. Yes, sir, after we settled on it, we began hauling some logs or lumber, and built shanties, and in three or four days after that I started for Faribault and filed on that land along with some others.

Q. Filed on it, how, under what law?

A. As a pre-emptioner.

Q. At the land office in Faribault?

A. Yes, sir.

100 Q. What land office was that?

A. The United States land office.

Q. Then how long did you reside on it, personally?

A. Until 1866 or 1867, I can't remember which.

Q. During the time you resided on it, how did you use the land, if at all; did you cultivate it?

A. Yes, sir, I had thirty-five or forty acres broke and fenced—I think a little more than that fenced; a house on it, built of pine timber, sixteen by twenty-two (16 x 22), a story and a half high.

Q. Did you break any land in 1857?

A. Yes, sir, about twenty acres; some of it afterwards went back.

Q. Describe the character of your house. Do you know what it cost?

A. It cost me about ($400.00) four hundred dollars.

Q. What year did you build the house?

A. In 1863 I built the house.

Q. You say you went off the land in 1866 or 1867?

A. Yes, sir.

Q. What did you go off for?

A. Well, we thought it was a loss of time staying on it. We had been warned off by the railroad company, the Winona & St. Peter Company.

Q. They claimed to own it, did they?

A. They claimed to own it, and ordered us off; the first time by a letter, the next time an officer served papers on us.

Q. And you got off because of that?

A. Yes, sir.

101 Q. After you went off personally, did you have anything to do with the land?

A. Yes, sir; I had a man on there. We rented a portion of it to him, and finally sold the fences and house to him.

Q. Do you recollect when the suit was brought against you by the Winona & St. Peter Land Compuny—the one that Judge Edgerton attended to for you—in which a judgment was entered against you for the possession of this land? Do you recollect these circumstances?

A. Yes, sir.

Q. At that time, Mr. Marshall, did you have a man on this place?

A. Yes, sir. This man was on it and offered me a $1,000.00 for the quarter providing——

Objected to as incompetent, irrelevant and immaterial.

Q. What I was trying to get at was, was this man on there by your permission at the time this suit was brought?

Objected to as leading.

A. Yes, sir. He was there by my permission.

Q. That was at the time this suit was brought against you, that I have just alluded to?

A. Yes, sir.

Q. After that suit was determined, you didn't have possession, did you?

Objection.

Q. After this suit was determined, that I speak of, you didn't have possession of the land?

By Mr. WILSON: I object to this as leading.

102 A. I didn't have possession any other than I had it before. This man was on it all the time.

Q. Did you after this suit was determined between you and the Winona & St. Peter Land Company rent out the farm?

A. No, we never rented it; this man still continued on it. I never rented it out.

Q. How far was this land situated from the railroad?

A. The railroad as it runs now, seven or eight miles.

Cross-examination.

By Mr. WILSON:

Q. You say it was about seven or eight miles, anyway?

A. Well, I may be mistaken there. I am counting from the station, because the road between the two stations may be a little bit nearer, but I don't think it could be much nearer.

Q. It could not be nearer than eight miles?

A. No, I don't think it was.

Q. Were you a married man the year that you settled there?

A. No, sir.

Q. Who settled with you?

A. My father and brother; the whole family.

Q. How many of the family, Mr. Marshall?

A. There were nine children, father and mother.

Q. You were not born in this country?

A. No, sir.

Q. When did you settle on this?

A. Well, the 30th of June I filed on it, I think. I settled on it three or four days before that.

103 Q. Who settled on it?

A. There was a lot of us, my father and his family; there were three or four families besides.

Q. On that quarter?

A. No, on different quarters.

Q. How many settled on that quarter?

A. Just me.

Q. What is the description of that quarter?

A. The northeast quarter section of section 35, town. 106, range 18. I can only give it from memory; it has been a long time since I saw the description of it.

Q. What did you do the first summer?

A. The first summer we broke about 20 or 30 acres on it.

Q. Was that 20 acres all on this land?

A. The first was on this land, but afterwards we broke 15 acres of my father's and some of my brother's.

Q. I think I understood you to say in the direct examination that some of this went back. Won't you please explain what you mean by this, as all of us might not understand it?

A. I mean that it went back into a wild state, it was too wet to cultivate, and in 1858 or '9 we could not plow it, so we let the weeds take possession of it. We didn't plow it after that.

Q. How much was there of that?

A. There must have been three or four acres.

Q. Where did you live during 1857, '8 and '9?

A. I lived with my father on the next quarter.

Q. What kind of a house did you build on this in 1857?

104 A. In 1857 we didn't have a house; only a shanty.

Q. What kind of a shanty?

A. Just built of lumber, that was all; it was big enough to have two beds and a stove.

Q. How was it built?

A. Well, if I remember right it was posts driven into the ground with boards only one way; only temporary, as it were.

Q. Well, about how long and how wide was it, according to your best recollection, Mr. Marshall?

—. Well, it may have been less than 12 feet wide; there were two beds in it; it must have been 16 feet long, may be 12 x 14 or 12 x 16. The boards stood on the ends lengthways.

Q. Was there a ridge in the roof?

A. No, sir; there was a sloping roof from front to back; there was no ridge. The roof was made in that way. It was of thin clap-boards or siding, oak boards that we got from the saw-mill.

Q. Was that building one that you could have lived in in winter?

A. Well, I hardly think so, it was just to pre-empt by. A pre-emption shanty.

Q. How much did it cost, do you think?

A. The lumber cost $15.00 a thousand.

Q. How much was there in it, do you think?

A. I don't know, may be twelve or fourteen hundred feet.

Q. Had you a door in it?

A. Yes, sir.

Q. How was that made?

105 A. That was made with a good Scotch blanket.

Q. How many windows did you have in it?

A. One; that was made of a sash, eight by ten, probably.

Q. Any glass in it?

A. Yes, sir; it was a half-sash, of an eight by twelve window.

Q. Was there any chimney in it?
A. No, sir.
Q. How long ago was it that you gave a deposition in this case about this very matter?
A. Well, it is probably six weeks ago.
Q. Didn't you testify then that there was no window in it?
A. Possibly I did.
Q. Possibly you did, you say?
A. Yes, sir.
Q. Well, if you did then don't you think you were likely right then?
A. I might possibly have been right then. I am not certain which it was—whether it was in my father's or mine.
Q. After you left this shanty did you ever live in it again?
A. No, sir.
Q. What year did you put up the house on your place?
A. In 1863.
Q. That is, six years afterwards?
A. Yes, sir.
Q. The railroad was staked out there before you went on it?

106 Objected to as incompetent, irrelevant, and immaterial and not cross-examination.

A. Yes, sir.
Q. You noticed it as you went on there, that it was staked out. How near was it staked?

Objected to as incompetent, irrelevant, and immaterial and not cross-examination.

A. About five miles.
Q. The stakes were driven in, so they were plain to be seen?

Objected to as incompetent, irrelevant, and immaterial.

A. Yes, sir.
Q. How much did you break between 1857 and the year 1863?
A. Well, I won't be certain. I was going to get married that next year and we broke quite a lot on the side of this same field, and after it was all broke we concluded there were thirty-five or forty acres, and I broke a little after that—after I got married.
Q. You got married what year, Marshall?
A. 1864.
Q. I understood you to state that after the suit brought by the land company, in which Judge Edgerton was your attorney, you didn't live on this land at all?
A. No, sir.
Q. Did you pay taxes on it?
A. We paid taxes but one year.
Q. Why didn't you?
A. We found out that they could not tax us unless we had a deed for it.

107 Q. Didn't you tell me when I examined you here before that you didn't pay taxes because you were going to lose the land anyway?

A. No, sir.

Q. Sure of that?

A. Certain. The first taxes we paid were for the year '57, and then the next year they taxed us again and we refused to pay them.

Q. After the suit, the one in which Judge Edgerton was your attorney, you say you left the land. Did you ever attempt to rent it to any one afterward?

A. I don't remember that we tried to rent it to anybody.

Q. You never went on it afterwards to live?

A. No, sir.

Q. You say you were ordered off by the railroad company?

A. Yes, sir.

Q. Who ordered you off?

A. The first time we got notice through the mails, it seems to me.

Q. From whom did you get that first notice?

A. It was from the land company, I suppose—it may have been from the railroad company, I won't be certain.

Q. Can't you give us any idea from whom that came?

A. No, I can't; it was from them that claimed the land, anyway. Some one that claimed the land; it was a railroad company, and it was them that notified us.

Q. It was a railroad company, or some kind of a land company?

108 A. There was no one to claim it but them; it might be the railroad company, or Winona & St. Peter Land Company. It was either one or the other of them. I am certain of that.

Q. What year was that?

A. Well, we got one the year before the other; first one we got, as near as I can recollect it, was through the post, the next one was served on us by an officer in 1866 or '67—I think it was '67.

Q. Well, who served it on you?

A. I don't remember, but it was an officer of some kind. Whether he was from Mantorville or Winona, I don't know.

Q. Whose name was signed to the paper?

A. It was from the land company or railroad company.

Q. What did the notice say?

Objected to as incompetent and not the best evidence.

A. I can't remember how it was worded, nothing about that, only I know what was the consequences of it. The consequence was that we came to the conclusion that they were disputing the title with us and that we had no chance with them, and we had better get out before we had incurred more expenses.

Q. And you say you thought you would leave?

A. Yes, sir.

Q. And you did leave?

A. Yes, sir.

Q. And you stayed left?
A. Yes, sir.
Q. After the determination of that suit, in the district court, then you didn't rent it any more?
109 A. This man stayed on it after that, but he didn't pay me any rent.
Q. Was there a floor in that shanty?
A. No, sir, just the earth; may be a board or two, in front of the bed if there were any at all.

Redirect examination.

By Mr. EVANS:

Q. I understood you to say in the direct examination that you cultivated the land from 1857 to 1866?

Objected to as leading and suggestive.

A. I cultivated the land from 1857 to '66, yes, sir.
Q. Now, you may state Mr. Marshall what you did each year from the time you went on that land in regard to cultivating it or improving it in any way?
A. Well, sir, my recollection is pretty vague. We broke 20 acres on the quarter we occupied, and the year following there was twelve or fourteen acres broke on the other side. The year after I was married I broke and paid for seven acres breaking, right around the house, and I guess that was about all the breaking on it.
Q. What was done with the land that was broke, in a general way what was the treatment of it?
A. It was cultivated right along with the exception of the few acres that went back, that were too wet for cultivation.
Q. Did you build any other houses on it, besides the shanty which you speak of?
A. Nothing but stables.
Q. What year did you build the last house?
A. In 1863.
Q. That was the summer before you were married?
A. Yes, sir.

110 Recross-examination.

By Mr. WILSON:

Q. Did you at any time during your occupancy or claim of that land pay taxes on it?
A. We paid one year's taxes.
Q. What year was that?
A. It was either '58 or '59, we paid it in 1858.
Q. That would be the taxes for the year 1857?
A. Yes, sir.
Q. Did I ask you when you were last examined "why would you not pay it" (that is, the taxes), and didn't you answer, "Because I thought we would not do it unless we could have it" (the land)?
A. I don't know whether I answered that way or not. We found out that we didn't have to pay it unless we had a title to it.

Q. Didn't you answer me in this way?

A. I may have answered it that way, but I answered it the other way, certain.

Q. You say you may have answered it that way the same time?

A. Yes, sir. But I answered it the other way I know.

Q. You say that some one told you that you could keep that without paying taxes?

A. Yes, sir. They told us that we need not pay any taxes until we got a deed for it.

It is stipulated and agreed that objections may be, and are hereby reserved by either party to any of the questions, answers or cross-questions or answers thereto.

111 (Title of Cause.)

Interrogatories and Answers.

Interrogatories and cross-interrogatories were propounded by complainant and defendant, The W. & St. P. R. R. Co., to S. W. Lamoreux, Commissioner of the General Land Office, and W. J. McGhee, chief of the railroad division of the General Land Office, which and the answers thereto are the same as appear in the record in the case of The United States *vs.* The W. & St. P. R. R. Co., The Minnesota Land and Investment Company, *et al.*, now pending in the second division of this court, reference to which record is by stipulation hereby made.

(Title of Cause.)

Stipulation.

It is hereby stipulated and agreed that Complainant's Exhibit "B," introduced in evidence in the above-entitled cause, to wit, a tabular statement showing the land grants made by Congress for the construction of railroads, wagon roads, canals and river improvements, with data relative thereto transmitted by S. M. Stockslager, acting Commissioner, to Hon. William F. Vilas, Secretary of the Interior, under date of March 8, 1888, may be used upon the hearing of the above-entitled cause, without printing the same in the trial record herein; reserving to the defendants, however, the objections thereto taken at the time said statement was in-

112 troduced in evidence, and the right to the defendants or any of them to move to strike out the same when the evidence in this case is reprinted.

Dated this 26th day of March, 1894.

ROB'T G. EVANS,
Special Assistant U. S. Attorney, of Counsel for Complainant.
WILSON & BOWERS,
Of Counsel and Solicitors for the Winona & St. Peter Railroad Company.
JAMES A. TAWNEY AND
HENRY M. LAMBERTON,
Of Counsel and Solicitors for the Winona & St. Peter Land Company.

(Title of Cause.)

Stipulation.

It is hereby stipulated and admitted by the respective counsel for the parties below named that any and all evidence relevant, pertinent or material to the issue in the above-entitled cause given, appearing or referred to in the trial record in the case of The United States against The Winona & St. Peter Railroad Company, The Winona & St. Peter Land Company, The Minnesota Land & Investment Company, and others, now pending in the second division of the above-named court, and which is to be heard with this case at St. Paul, in said circuit, shall be considered and may be referred to as offered and received in evidence in this case, and may be read from the printed record above referred to, subject to all objections which have been reserved thereto and to the objection that it is incompetent, irrelevant and immaterial in this case, and said
113 evidence in said printed record may be referred to upon any hearing hereof with the same force and effect as if it had been formally offered and received and printed in the record in this case.

ROB'T G. EVANS,
Special Ass't U. S. Att'y, of Counsel for Complainant.
THOMAS WILSON AND
LLOYD W. BOWERS,
Solicitors for W. & St. P. R. R. Co.
JAMES A. TAWNEY AND
HENRY M. LAMBERTON,
Solicitors for W. & St. P. Land Co.

(Title of Cause.)

Order and Stipulation.

Pursuant to the stipulation of the parties hereto attached, dated March 21, 1894, it is ordered that William A. Spencer, Esq., clerk of the United States district court in and for the district of Minnesota, be and he is hereby appointed as of April 1st, 1893, as a special master to take and report the testimony in the above-entitled cause, and that all testimony which has heretofore been or may hereafter be taken before him in said cause, or before other officers agreed upon by the parties and transmitted to him, together with all records, documents and stipulations filed with him as evidence in said cause, be by him transmitted and reported to the clerk of the United States circuit court in which this cause is pending, and that all objections to testimony so transmitted and reported as provided in said stipulation be reserved to the parties herein, as is therein provided.

114 It is further ordered that this order be entered *nunc pro tunc* as of April 1st, 1893.

Dated March 29th, 1894.

By the court:

ALFRED D. THOMAS, *Judge.*

(Title of Cause.)

It is hereby stipulated and agreed by and between the complainant and defendants in the above-entitled cause that the testimony taken upon the part of the complainant and defendants herein before William A. Spencer, clerk of the United States district court, in and for said district, as a master agreed upon for such taking, together with all testimony taken before other officers within or without the State of Minnesota by stipulations heretofore entered into, or upon notice, shall be filed by and through said Spencer in the office of the clerk of the United States circuit court above named, and that said testimony shall have the same effect in all respects and be used as evidence upon the trial of said cause as fully as if regularly taken before a master in chancery appointed by said court.

It is further stipulated that an order shall be made by said court *nunc pro tunc* as of April 1st, 1893, appointing said Spencer as special master to take and report testimony in said cause.

It is further stipulated and agreed that neither of the parties hereto waive any objections to the competency, relevancy, or materiality of the testimony so taken, or any other objection saved and reserved by the stipulations for taking any portion of said
115 testimony or by objections made at the time witnesses were examined or records introduced, but that such objections and all thereof are reserved, to be urged upon the hearing of said cause in said court.

Dated March 21st, 1894.

ROB'T G. EVANS,
Special Ass't U. S. Attorney, of Counsel for Complainant.
THOMAS WILSON AND
LLOYD W. BOWERS,
Attorneys for the Winona & St. Peter Railroad Company.
JAMES A. TAWNEY AND
HENRY M. LAMBERTON,
Attorneys for the Winona & St. Peter Land Company.

116 And on the third day of December, A. D. 1894, an appearance of counsel for appellant was filed in the clerk's office of said United States circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY *et al.* } No. 566.

The clerk will enter my appearance as counsel for the appellant.

ROB'T G. EVANS,
Sp'l Ass't U. S. Att'y, for Appellant.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1894. No. 566. United States, appellant, *vs.* Winona & St. Peter R. R. Co. *et al.* Appearance. Filed Dec. 3, 1894. John D. Jordan, clerk. Rob't G. Evans, special ass't U. S. attorney, counsel for appellant.

And on the third day of December, A. D. 1894, an appearance of counsel for appellee The Winona & St. Peter Railroad Company was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY *et al.* } No. 566.

The clerk will enter *my* appearance as counsel for the W. & St. P. R. Co.

THOMAS WILSON.
LLOYD W. BOWERS.

117 Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1894. No. 566. United States, appellant, *vs.* Winona & St. Peter R. R. Co. *et al.* Appearance. Filed Dec. 3, 1894. John D. Jordan, clerk. Thomas Wilson, Lloyd W. Bowers, counsel for W. & St. P. R. R. Co.

And on the third day of December, A. D. 1894, an appearance of counsel for appellees Winona & St. Peter Land Company was filed in the clerk's office of said circuit court of appeals in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY *et al.* } No. 566.

The clerk will enter *my* appearance as counsel for the *the* Winona & St. Peter Land Co. and fourteen other defendants.

HENRY M. LAMBERTON.
JAMES A. TAWNEY.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1894. No. 566. United States, appellant, *vs.* The Winona & St. Peter R. R. Co. *et al.* Appearance. Filed Dec. 3, 1894. John D. Jordan, clerk. Henry M. Lamberton, James A. Tawney, counsel for appellees.

And on the tenth day of January, A. D. 1895, an appearance for appellee Thomas Marshall, Jr., was filed in the clerk's office of said circuit court of appeals in words and figures following, to wit:

118 United States — Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA, Appellant,
vs.
WINONA & ST. PETER RAILROAD COMPANY, WINONA AND ST. Peter Land Company, and Thomas Marshal-, Jr., Appellees.

To the clerk of the above-named court:

I hereby enter my appearance in the above-entitled action as solicitor for the defendant Thomas Marshall, Jr., and consent that said cause may be set down and heard January 10th, 1895.

MARK H. DUNNELL,
Solicitor for the Above-named Defendant,
Thomas Marshall, Jr.

Dated December 20, 1894.

Endorsed: No. 566. U. S., appellant, *vs.* Winona & St. Peter R. R. Co., Thomas Marshall, Jr., appellees. Appearance for T. Marshall, Jr., and consent to hearing. Filed Jan. 10, 1895. John D. Jordan, clerk.

And on the 15th day of January, A. D. 1895, in the record of the proceedings of said circuit court of appeals, is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

UNITED STATES OF AMERICA, Appellant,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY *et al.*, Appellees. } No. 566.

Appeal from the circuit court of the United States for the district of Minnesota.

TUESDAY, *January* 15, 1895.

119 This cause having been heretofore advanced and called for hearing this day, argument was commenced by Mr. Robert G. Evans in behalf of appellant, continued by Mr. Thomas Wilson in behalf of appellees, and concluded by Mr. Robert G. Evans for the appellant.

Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the sixth day of May, A. D. 1895, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

120 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1895.

THE UNITED STATES OF AMERICA, Appellant, *vs.* THE WINONA & ST. PETER RAILROAD Company, The Winona & St. Peter Land Company, and Thomas Marshall, Jr., Appellees.	No. 566. Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. Robert G. Evans for the appellant.

Mr. Thomas Wilson (Mr. Lloyd W. Bowers was with him on the brief) for appellees.

Before Caldwell, Sanborn, and Thayer, circuit judges.

The facts are stated in the opinion.

SANBORN, J., delivered the opinion of the court:

This is an appeal from a decree dismissing a bill brought by the United States under the act of March 3, 1887 (24 Stat. 556) to restore to the United States the title to one hundred and sixty acres of land, which at the commencement of this suit was held by the appellee, The Winona & St. Peter Land Company. That corporation had acquired its title through a certification of the land to the State to aid in the construction of the railroad of the Winona & St. Peter Railroad Company, the purchase of the land from that company by Barney and his associates, the purchase of the land from Barney and his associates by the land company, and through conveyances of the land by the State to the railroad company and by the railroad company to the land company, in the same way in which it acquired the land it held under the certificates for the benefit of the Winona Railroad Company in No. 564, United States *v.* The Winona & St. Peter Railroad Company, The Winona and St. Peter Land Company, The Minnesota Land & Investment Company *et als.* — Fed. Rep. —. The method by which that title was
121 acquired by the land company and the rules and principles which measure the rights of the parties to it are stated with some care in the opinion in that case and will not be here repeated. The two cases were argued and submitted together, and, with the exceptions to which we shall refer, the material facts in the two cases are the same.

The record in this case discloses one decisive fact which did not appear in that case. We held in that case that the United States could not maintain its suit to restore the title to the land held by this land company under the certificates to the State for the Winona Railroad Company, because both Barney and his associates and the

land company were *bona fide* purchasers of the title to that land without notice of any defects therein. In this case they had full notice of the defects in the title to the one hundred and sixty acres in question here before they bought or paid for the land. The grant was made March 3, 1857. 11 Stat., 195. On June 30, 1857, one Marshall took possession of the land and commenced to occupy and cultivate it for the purpose of acquiring the title to it under the pre-emption laws. On July 3, 1857, he made a pre-emption filing upon it in the proper land office, which has never been canceled. He held the possession of this land until 1878, when a judgment was rendered against him in an action of ejectment, which was brought by the land company in 1877 in the district court of Dodge county, Minnesota. In the meantime he had built a house and stables upon the land and had cultivated and dwelt upon it at least a portion of the time. After the judgment of the district court had been rendered in 1878 he surrendered the possession of the land to this land company in obedience to that judgment. On November 15, 1887, he filed in the office of the Commissioner of the General Land Office an application for a reinstatement of his pre-emption rights, which has not been passed upon by the Land Department because that tribunal holds that it has no jurisdiction to consider it. This land is within the place limits of the grant for the Winona Company under the act of March 3, 1857. 11 Stat., 195. After the pre-emption filing was made and while Marshall was in possession of this land claiming it as a pre-emptor, the line of the definite location of the Winona Company was fixed, this land was certified to the State to aid in the construction of that railroad, Barney and his associates bought it of the railroad company, the land company bought it of Barney and his associates, and the legal title was finally on April 21, 1876, vested in the land company by means of conveyances from the State to the railroad company and from the railroad company to the land company.

The possession of this land by Marshall claiming under his pre-emption filing was notice to Barney and his associates and to the land company of his claims to the land as a pre-emptor and of the fatal defect in their title to which these claims so clearly pointed. Lea *v.* Polk County C. Co., 21 Howard 493, 498; Noyes *v.* Hall, 97 U. S. 34, 37, 38; Siebert *v.* Rosser, 24 Minn. 155, 161; 16 Am. & Eng. Encyc. of Law, title "Notice," subtitle "Possession," p. 800, and authorities there cited. The purchase of the land company, therefore, lacks the essential element of absence of notice of defects in its title, and it cannot in this case sustain the defense that it is a *bona fide* purchaser.

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Nor can the United States be deprived of the relief sought in this suit by the statute of limitations, or by its laches, or on the ground of an estoppel *in pais*. No equitable estoppel against the Government arises here from the fact that, if the United States had promptly set aside the certification of this land to the State in 1862, immediately after it was made, the railroad company and its grantees might have acquired indemnity lands in place of this tract, while no such lands can now be found or obtained. Mr. Justice Field in delivering the

opinion of the Supreme Court in Henshaw *et al. v.* Bissell, 18 Wall. 255, 271, declared that, "there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud," to warrant the application of the doctrine of equitable estoppel. There was no intended deception in the conduct or certification of the Government or of any of its officers in this case. They acted in the utmost good faith and their delay was the result of their honest belief that the land had been properly certified. The negligence of the officers of the Government however gross could not raise an estoppel against it. Negligence is but another name for laches. Public policy demands that public interests shall not be prejudiced or jeopardized by the carelessness of governmental officials. It has been long and conclusively settled that the United States is not bound by any statute of limitations nor barred by any laches or negligence of its officers, in a suit to enforce the rights or to protect the interests vested in it as a sovereign government. Lindsey *v.* Miller, 6 Peters 666; United States *v.* Knight, 14 Peters 301, 315; Gibson *v.* Chouteau, 13 Wall. 92; United States *v.* Thompson, 98 U. S. 486; Fink *v.* O'Neil, 106 U. S. 272, 281; United States *v.* Nashville, &c., R'y Co., 118 U. S. 120, 125; United States *v.* Beebe, 127 U. S., 338, 344.

It may be conceded that if Marshall, the pre-emptor, had brought a suit in 1891, when this suit was commenced, to obtain a decree to the effect that the title of the land company was held by it in trust for him, the statute of limitations of Minnesota and his own laches would have defeated him. St. Paul & Stillwater R'y Co. *v.* Sage, 4 U. S. App. 160.

Nor is it denied that "when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone." United States *v.* Beebe, 127 U. S. 338, 347; Curtner *v.* United States, 149 U. S. 662, 674. But the United States sustains no such relation to this suit. The act
123 of Congress of March 3, 1887 (24 Stat. 556), made it the duty of the Secretary of the Interior to adjust the land grant of the Winona Company, and to demand the reconveyance to the United States by that company of any lands erroneously certified to the State for the benefit of the company. This tract of land was erroneously certified for the benefit of the Winona Company, and the Secretary demanded its reconveyance. The act of Congress required the Attorney General, in case the railroad company should fail to reconvey the land within ninety days after the demand of the Secretary, to bring this suit or a like proceeding to cancel the certification to the State and to restore the title of the land to the United States. The railroad company failed to reconvey for ninety days after demand, and the Attorney General exhibited this bill as the act of Congress directed him to do. The only evidence tending

to show that this suit was instigated by Marshall or that it is prosecuted for his benefit is the fact that he filed a petition with the Commissioner of the General Land Office in November, 1887, for a reinstatement of his pre-emption rights. It cannot be presumed that this petition was the only or the proximate cause of the institution of a suit which Congress had directed to be brought in any event. It was the duty of the Secretary of the Interior and the Attorney General to investigate this case and to prosecute this suit regardless of the application of Marshall. That the faithful discharge of the duties of government may result in the protection or restoration of the rights of individuals, does not deprive those duties of their public character or privileges. Moreover, the United States is not without interest in this suit. If Marshall's claims as a pre-emptor are ultimately sustained the Government will receive from him at least the minimum price of the land (sec. 2259 Rev. Stat.), and if they are not sustained they will have the land itself.

Our conclusion is that the United States has a pecuniary interest in the result of this suit, that it is brought and is prosecuted by the direction of Congress to protect the public interests and to discharge the duties imposed upon the United States as a sovereign Government, and that the Government is entitled to the benefit of its exemption from the statute of limitations and from laches in this case.

The decree below must be reversed and the cause remanded with direction to enter a decree for the relief prayed in the bill, and it is so ordered.

Filed May 6, 1895.

A true copy.

Attest: ——— ———,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

124 And on the sixth day of May A. D. 1895, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

MONDAY, *May* 6, 1895.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY, THE WINONA AND ST. PETER LAND COMPANY, and THOMAS MARSHALL, Jr., Appellees. } No. 566.

Appeal from the circuit court of the United States for the district of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed without costs to either party in this court. It is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to enter a decree granting the relief as prayed in the bill of complaint.

May 6, 1895.

And on the fifth day of May, A. D. 1896, a petition for and order allowing appeal was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

125 Circuit Court of Appeals of the United States for the Eighth Judicial Circuit, District of Minnesota.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY, THE WINONA and St. Peter Land Company, and Thomas Marshall, Junior, Appellees.

The above-named appellees, The Winona and St. Peter Railroad Company and The Winona and Saint Peter Land Company, conceiving themselves aggrieved by the order and decree entered on the 6th day of May, 1895, in the above-entitled proceedings, doth hereby appeal from the said order to the Supreme Court of the United States, and prays that its appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

THOMAS WILSON, *Att'y for W. & St. P. R. Co.*
JAMES A. TAWNEY &
H. M. LAMBERTON,
Attorneys for Appellant.
WINONA AND SAINT PETER LAND CO.,
WINONA, MINNESOTA.

ST. PAUL, *May 5th*, 1896.

And now, to wit, on May 5th, 1896, it is ordered that the appeal be allowed as prayed for.

(Signed) WALTER H. SANBORN,
Circuit Judge.

Endorsed: No. 566. United States of America, appellant, *vs.* Winona & St. Peter R. R. Co. *et al.* Petition for & order allowing appeal. Filed May 5, 1896. John D. Jordan, clerk.

126 And on the sixteenth day of May, A. D. 1896, an appeal bond was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

Know all men by these presents that we, the Winona and St. Peter Land Company, by H. W. Lamberton, its land commissioner, and the Winona and St. Peter Railroad Company, as principals, and Henry W. Lamberton and George Baumgartner, as sureties, are held and firmly bound unto the United States of America in the full sum of five hundred dollars, to be paid to the said United States of America, its successors or assigns; to which payment, will and truly to be made, we bind ourselves, our successors, executors, heirs, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated the fifth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the circuit court of appeals of the United States for the eighth circuit, in a suit pending in said court between The United States of America, appellant, and The Winona and St. Peter Railroad Company, The Winona and St. Peter Land Company, and Thomas Marshall, Junior, appellees, a final order was rendered against said appellees, directing that the decree of the circuit court of the United States for the district of Minnesota there-fore entered be reversed, and directing it to enter a decree for the relief prayed for in the bill in said cause, and the said Winona and St. Peter Land Company and the said Winona & St. Peter Railroad Company having prayed and been allowed an appeal to the Supreme Court of the United States from said final decree in said suit:

Now, therefore, the condition of this obligation is such that if the said Winona and St. Peter Land Company and The Winona & St. Peter Railroad Company, said appellants, will prosecute their said appeal to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

127 WINONA & ST. PETER LAND CO., [SEAL.]
By H. W. LAMBERTON, *Land Commissioner.*
HENRY W. LAMBERTON. [SEAL.]
GEORGE BAUMGARTNER. [SEAL.]

Signed, sealed, and delivered in the presence of—
HENRY M. LAMBERTON.
JOHN D. VALINSKE.

Approved:
(Signed) WALTER H. SANBORN,
Circuit Judge.

May 16, 1896.

STATE OF MINNESOTA, } ss:
County of Winona, }

On this 5th day of May, A. D. 1896, before me personally appeared H. W. Lamberton, land commissioner for the Winona and St. Peter Land Company, and Henry W. Lamberton and George Baumgartner, to me known to be the persons described in and who executed

the foregoing instrument, and each then and there acknowledged that he executed the same as his free act and deed.

[SEAL.] HENRY M. LAMBERTON,
Notary Public, Winona County, Minnesota.

STATE OF MINNESOTA, }
County of Winona, } *ss:*

Henry W. Lamberton and George Baumgartner, being first duly sworn, says, each for himself, that he is a freeholder and resident of the State of Minnesota; that he is one of the sureties named in the foregoing bond and is worth the sum of one thousand dollars over and above his debts and liabilities and exclusive of his property exempt from execution.

HENRY W. LAMBERTON.
GEORGE BAUMGARTNER.

Subscribed and sworn to before me this 5th day of May, A. D. 1896.

[SEAL.] HENRY M. LAMBERTON,
Notary Public, Winona Co., Minn.

128 Endorsed: No. 566. In the Supreme Court of the United States. United States of America, respondent, *vs.* The Winona and St. Peter Railroad Company, The Winona and St. Peter Land Company, and Thomas Marshall, Jr., appellant-. Appeal bond. Filed May 16, 1896. John D. Jordan, clerk.

And on the twenty-seventh day of May, A. D. 1896, there was filed in the clerk's office of said circuit court of appeals a citation in said cause, the original of which, with admission of service thereon, is hereto attached and herewith returned:

129 UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, D. C., thirty days from the date hereof, pursuant to an appeal taken out of, allowed by the circuit court of appeals of the United States for the eighth circuit, and filed in the clerk's office of the circuit court of appeals of the United States for the eighth circuit, wherein The Winona and St. Peter Railroad Company and The Winona and Saint Peter Land Company are appellants and The United States of America appellee, to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice, on this 5th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

WALTER H. SANBORN,
U. S. Circuit Judge.

[Endorsed:] In the Supreme Court of the United States. United States of America, complainant & respondent, *vs.* The Winona and St. Peter Railroad Company, The Winona and St. Peter Land Company, and Thomas Marshall, Jr., defendants & appellants. Filed May 27, 1896. John D. Jordan, clerk. Service of the within order is hereby admitted this 15th day of May, 1896. Rob't G. Evans sp'l ass't U. S. att'y.

130 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing 129 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of The United States of America, appellant, *vs.* The Winona & St. Peter Railroad Company *et al.*, No. 566, May term, 1895, as the same remain upon the files and records of said United States circuit court of appeals.

I do further certify that on the eighth day of July, A. D. 1895, a mandate was issued out of the clerk's office of said circuit court of appeals in pursuance of the decree of said court, directed to the circuit court of the United States for the district of Minnesota.

I do further certify that the original citation in said cause is hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Paul, Minnesota, this — day of May, A. D. 1896.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 16,381. U. S. circuit court of appeals, 8th circuit. Term No., 602. The Winona & St. Peter Railroad Company *et al.*, appellants, *vs.* The United States. Filed September 11, 1896.

165-483

602

165-483

NOV 30 1896
JAMES H. MCKENNEY,
CLERK

Supreme Court of The United States.

OCTOBER TERM, 1896.

THE WINONA AND ST. PETER RAILROAD COMPANY, ET AL,

Appellants.

VS.

THE UNITED STATES.

BRIEF . . .

ON BEHALF OF THE APPELLANT:
THE WINONA & ST. PETER LAND CO.

J. A. TAWNEY, AND
H. M. LAMBERTON,
SOLICITORS FOR THE WINONA & ST. PETER LAND CO.

Supreme Court of The United States.

OCTOBER TERM, 1896.

THE WINONA AND ST. PETER RAILROAD COMPANY, ET AL,

Appellants.

VS.

THE UNITED STATES.

BRIEF ON BEHALF OF APPELLANT, THE WINONA AND ST. PETER LAND COMPANY.

This case involves substantially the same material facts disclosed by the record in case No. 321, the United States, appellant, against the Winona & St. Peter Railroad Company *et al*, appellants, argued and

submitted in the Circuit Court of Appeals at the same time and upon the same briefs.

From the decree of the Circuit Court of Appeals in this case, directing that the title to the north-east quarter of section 35, township 106, North, range 18 West, Dodge County, Minnesota, be restored to the United States and the certification thereof to the State of Minnesota, the conveyance of the same by said state to the Winona and St. Peter Railroad Company and the conveyance by said Railroad Company to said Land Company and each thereof be set aside and cancelled, the Winona and St. Peter Railroad Company and the Winona and St. Peter Land Company appeals.

The recovery of this land and the cancellation of the certificate and deeds of conveyance by which the title thereto has been conveyed to the appellant Land Company is attempted under the provisions of the act of Congress, approved March 3rd, 1887. (24 Stat. 556.)

The provisions of this act have been heretofore fully discussed in case No. 321 between the same parties. It is therefore unnecessary to again consider the same, except to say that section 2 of that act which authorizes suit brought to recover lands erroneously certified, on which pre-emption filings and homestead entries have heretofore been made and cancelled, is not applicable to the land here involved, for the reason that in this case the pre-emption filing was never can-

celled of record. If this suit is authorized by that act it must be under the provisions of section I and upon sole ground that this tract of land is claimed to have been erroneously certified.

STATEMENT OF FACTS.

The land here involved lies within the primary or six-mile limit of the grant to the territory of Minnesota to aid in the building of the Winona and St. Peter Railroad. (11 Stat. 195. Rec. P. 26.)

The line or route of this road opposite the land was surveyed and staked out on the earth's surface prior to June 30th, 1857, and before it was settled or filed on by Marshall. (Test. of Marshall, Rec. P. 58.

The map of definite location of the line of road was filed in the office of the Commissioner of the General Land Office July 29th, 1858.

July 3, 1857, Marshall made a pre-emption filing on the land alleging settlement June 30th, 1857. It does not appear from the records that this filing has ever been cancelled or that final proof or payment was ever made or offered by Marshall.

December 1st, 1862, this tract together with other land was duly certified by the Secretary of the Interior to the State of Minnesota under the act of March 3rd, 1857, as part of the land granted to the State for the benefit of the Winona and St. Peter Railroad Company.

February 12th, 1867, it was, by deed, conveyed from the State to the Railroad Company. October 31st, 1867, it was purchased by one Barney and his associates, (Ex. "A", Rec. P. 31) and on April 21st, 1876, almost at nine years thereafter, it was by deed conveyed from the Railroad Company to the appellant Land Company. These deeds were all duly recorded in the proper office. (Rec. P. 27.)

Marshall remained in possession of the land from the date of his settlement until 1866 or '67, but never tendered proof of his having complied with the law under which his filing was made, nor did he ever pretend to contest in the public land office the right of the Railroad Company to the land. On the contrary, he voluntarily abandoned the same as above stated. (Test. of Marshall, Rec. P. 55.)

November 15th, 1887, more than thirty years after settling upon the land, and twenty years after his voluntary abandonment thereof, he filed in the office of the Commissioner of the General Land office an application for re-instatement of his pre-emption rights. This application has never been considered or passed upon by the department:

It is conceded "that on and before and for a long time after the year 1879, it was uniformly ruled and held by the Secretary of the Interior and other officers of the Land Department of the United States, that a

line of railroad became and was definitely fixed so as to attach the grant to the odd-numbered sections within the granted limits as soon as surveyed and staked out on the face of the earth, and that a pre-emption claim or filing which may have existed to the tract of land at the time of the attachment of the Railroad Company's grant, if subsequently abandoned or not consummated, even though in all respects legal and *bona fide*, was held not to operate to defeat the grant, but on failure of such claim the land covered thereby was held to inure to the grant as of the date when the grant became affective; and that in accordance with and pursuant to the aforesaid rules, the grants to and for each and all of the land-grant railroad companies in the State of Minnesota were before and for a long time after the year 1879 administered." (Rec. P. 29, paragraph 11.)

March 1st, 1877, a certain man, whose name is not disclosed by the record. being in possession of the land in question and claiming the right to such possession by permission from Marshall, but paying no rent therefore, (Test. of Marshall, Rec. P. 56) the appellant Land Company, in order to legally eject such person from the premises, commenced an action for that purpose in the District Court of Dodge County, Minnesota, against Marshall under whom this party claimed to hold possession. It is admitted (Rec. P.

28) that the court had jurisdiction of the subject matter of this action; that Marshall appeared therein; that such proceedings were had and that it was by the court on the 9th day of December, 1878, considered, held and adjudged that the appellant Land Company recover possession of said land; that no appeal was taken from this judgment; that in pursuance thereof and ever since said judgment was rendered this appellant Land Company has been in possession of the land and has paid taxes thereon.

ASSIGNMENTS OF ERROR.

We respectfully submit that the court below erred in holding:

First: That the possession of this land by Marshall until 1867 under his pre-emption filing was notice, either to Barney and his associates, who purchased the land after Marshall abandoned it, or that it was notice to the Land Company when, nine years later it purchased the land from Barney and others, of any defect, either fatal or otherwise, in the certification thereof to the state or ~~fatal or otherwise, or~~ in the title thereto obtained from its grantor, or notice of any claim or right therein adverse to the right of the

said Land Company.

Second: That the purchase of the land by the appellant Land Company lacks the essential element of absence of notice of defects in its title and that it cannot, therefore, sustain the defense of being a *bona fide* purchaser.

Third: That the United States has a pecuniary interest in the result of this suit and is, therefore, exempt from the statute of limitations and from the plea of laches.

ARGUMENT.

The two first assigned errors and their effect are so closely related that they may be properly discussed as one. They involve in the main the single question of whether or not the appellant Land Company is a *bona fide* purchaser of this tract of land.

Two of the essential elements to constitute a *bona fide* purchaser are conceded to exist, viz: A valuable consideration and good faith. Indeed, no question can be raised upon the record as to either of these two propositions. This land was included in and constituted a part of the land purchased by Barney and his associates from the Railroad Company under the contract (Ex. "A") hereinbefore referred to. That

is, Barney and others in consideration of receiving this land, satisfied and discharged the entire indebtedness of the Railroad Company to them and relinquished all their evidence of such indebtedness, together with their stock in and their control of said Railroad Company. (Ex. "A", Rec. P. 31.)

The appellant Land Company in exchange for this and other lands gave to Barney and his associates the stock of said Company, whereupon the land was duly conveyed to it. A full discussion of our position in reference to this branch of the case is contained in our brief in case No. 321, to which reference is hereby made.

THE ELEMENT OF NOTICE.

The learned court in holding that the appellant Land Company is not a *bona fide* purchaser rests its decision wholly upon two facts claimed to be established by the record. First, the uncancelled pre-emption filing of Marshall of date July 3, 1857, and of record at the date of purchase, and second, that Marshall was in possession of the land in 1876 when the same was purchased by the Land Company under his pre-emption filing.

The pre-emption filing, it is true, was uncancelled

of record in 1867, but we respectfully submit that the testimony of Marshall himself (Rec. P. 55) conclusively shows that he was not only not in possession when the land was conveyed, in 1867, to Barney and others and by them conveyed to the appellant Land Company nine years thereafter, but that in 1866 or '67 he voluntarily abandoned the premises, for the reason, as stated by him, that "we thought it was a loss of time staying on it. We had been warned off by the Railroad Company,—the Winona and St. Peter Company." (Marshall's test., Rec. P. 55.)

It nowhere appears in the record that Marshall was thereafter in possession of this land in person, and under the law governing his rights as a pre-emptor, the possession of any other person claiming either as tenant or by license from Marshall would not be notice to a subsequent purchaser of any rights whatever to the land in the original pre-emptor, or notice of any defect in the title conveyed by patent issued while such person was in possession.

The existence of the non-cancelled filing, after the issuance of the patent or the certification of this land to the State, we submit in no wise charged the appellant Land Company with notice of any defect whatever in the title of its grantor or of any defect in the certification of the land to the state. All rights acquired by Marshall by virtue of his pre-emption fil-

ing were entirely exhausted long before the land was certified to the State or purchased by Barney and the Land Company. His pre-emption filing was made July 3rd, 1857. At no time did he make any proof of his having complied with the under which his filing was made, nor did he make or offer to make, payment for the land either within the time fixed by statute, or at any other time before or after the land was certified to the State.

Section 2,272 of revised statutes provides that, "nothing in the provisions of this chapter shall be construed to preclude any person, who may have filed a notice of intention to claim any tract of land by pre-emption, from the right, allowed by law to others, to purchase such tract by private entry after the expiration of the right of pre-emption."

By the concluding clause of this section it is clear that congress contemplated such a possibility as an "expiration of the right of pre-emption" without title, rights or equities being acquired under the pre-emption law, either as against the United States or a subsequent claimant for the land, after the time fixed by statute during which the pre-emptor enjoyed the sole and exclusive right of purchase and in such case Congress made provision therefor.

In the case of J. B. Raymond, 2 D. Int. Dept. P. L. 854, Secretary Teller said:

"The right, then, to hold land before payment is made therefor upon promise to buy the same at a stip-

ulated time, together with the right to purchase at such time, is the "pre-emptive right" referred to in section 2,261 and such right is initiated by settlement and filing a declaratory statement and has had its full life when the time stipulated for purchase arrives."

Five years having elapsed between the date of Marshall's filing and the date when the land was certified to the State for the benefit of the Railroad Company, and he not having, during that time, complied with the law in respect to proof and payment, it is clear that his pre-emptive right was at that time completely exhausted and that the land was properly within the jurisdiction of the Land Department, and subject to disposition by that department, when it was selected and claimed by the Railroad Company as a part of the grant to the State of Minnesota for its benefit.

It is likewise clear that, this being the case, the legal title passed to the State when the land was certified in accordance with the provisions of that grant and the rules of the Deparment of the Interior and the department of Justice under which the grant was being administered.

The fact that the land was claimed by the Railroad Company, and that Marshall was requested to leave the same, will not excuse his failure to at least attempt to comply with the law under which his filing was made prior to the time when it was certified to the State. The fact that he did not do so but voluntarily

abandoned the same is very easily understood when viewed in the light of the rulings of the Land Department at that time with respect to the date when the rights of the company attached to the grant. His pre-emptive right, therefore, having been exhausted by reason of his own failure to attempt to comply with the law under which that right was acquired before the land was certified to the State, and the fact that it had not been declared forfeited or cancelled, did not in any manner effect the jurisdiction of the Land Department over this land at the date of the certification, nor does it constitute any other or different defect in the title to the land conveyed to the State by such certification than that which existed in the title to all other lands so certified on which pre-emption filings and homestead entries had previously been made and cancelled, nor did it constitute any other or different notice of the erroneous certification of such lands than that in respect to other lands on which such filings or entries had previously been made and cancelled.

A pre-emption filing creates no rights in the pre-emptor to the land that would deprive the Land Department of its jurisdiction or control over the land after the time for perfecting that right by proof and payment had expired. When that time has expired and the land is claimed by another, it then becomes the duty of the Department to determine, first, whether

the pre-emption right is still in force, and if upon investigation it is found to have been exhausted, the land is then completely within the jurisdiction of the Department. Whether the right of pre-emption has been forfeited by lapse of time or not, the right to at any time investigate this question, when the land is claimed by another, does at all times exist in the Department, and when on investigation it appears from the records that the pre-emptor has by lapse of time forfeited such right, it then becomes the duty of the Department to decide whether or not the second claimant is entitled to the land. If the Department concludes that he is, and as in this case, issues a patent therefor, or certifies the same under authority of Congress, the legal title to such land passes, though the department may have erred in its construction of the law as to the rights of such second claimant, in which case, the act of the Secretary of the Interior in certifying the land would not be void but merely voidable.

Again, we respectfully submit that if the Land Department of the United States having, as it did have, jurisdiction over the land in question, had issued a patent therefor to a third party, that this would be *prima facie* evidence of the fact that Marshall had not complied with the legal requirements, or had abandoned the land, and this, too, without any express cancellation of the pre-emption filing? The same rule

applies in the case at bar. The certification of this land to the State by the proper officers of the government was *prima facie* evidence that Marshall was not entitled to the land under his pre-emption filing or had abandoned it, even though there was no cancellation of that filing. No overt act on the part of the Land Department cancelling his pre-emption filing was necessary to terminate the right which Marshall originally acquired by such filing. That right terminated by the act of the pre-emptor himself in failing to comply, within the time specified by law, with the requirements of the act under which the filing was made. The certificate, therefore, by which the legal title was conveyed from the government to the State furnishes to Barney and his associates and to the appellant Land Company *prima facie* evidence that Marshall had no valid claim to this land. In support of our position see Minter v. Crommelin, 18 How. 89.

In the above case the land patented to the pre-emptor had been reserved by an act of Congress to a Creek warrior, but the act provided that if the warrior abandoned his reservation, it should be forfeited, and the Secretary of the Interior might then order its sale. The court held that the patent was *prima facie* evidence that the warrior had abandoned his reservation, that the Secretary of the Interior had ordered the sale

and that the legal title had passed to the pre-emptor.

It will be borne in mind that Barney and his associates did not purchase this land until 1867, five years after it was certified to the state for the benefit of the Railroad Company and that the appellant Land Company did not purchase the same until 1876, fourteen years after its certification to the State.

On the last mentioned date Marshall was not in possession of the premises, nor was he in possession in 1867. The certification of the land, therefore, to the State, in 1862, being *prima facie* evidence of the cancellation of Marshall's filing and of his abandonment of the claim, the Land Company would not be chargeable with notice of such filing, or of any defect in the certification of the land to the State, and would not be put upon inquiry so far as the mere question of non-cancellation of the filing is concerned.

WAS MARSHALL IN POSSESSION?

We now come to the second branch of the subject, viz: Did Marshall, or some one claiming under him, have possession of the land at the time of its purchase by the Land Company, and if so, did this naked possession charge the Land Company with notice of any defects in the certification of this land to the

State? The claim that some one was in possession by permission from Marshall at the time the land was purchased by the Land Company, as effecting the question of notice, is scarcely worthy of consideration, for the reason, as we have before stated, that under the pre-emption laws actual, and personal, possession by the pre-emptor was not only necessary to secure to him the benefits of such law, but also necessary to charge others claiming the land, by purchase or otherwise, of notice of any claim or right thereto by the pre-emptor under his pre-emption ftling. Marshall, himself, testifies that in 1866 or '67 he left the land because he came to the conclusion it was unnecessary to incur any expense in contesting his right to the land as against the right of the Company. (Marshall's test., Rec. P. 59.)

Marshall does not seem clear in his testimony, on page 59 of the record, as to whether he left pursuant to a notice from the Railroad Company or from the Land Company, but he does state very positively that it was in the year 1866 or '67 (ten years prior to the purchase by the Land Company) that he left the land and that thereafter he sold the improvements which he had made upon the land and that the land was thereafter in the possession of another person by his permission. (Mar. test. Rec. P. 55, 59.)

Of course if the land was not occupied by Mar-

shall in person under his pre-emption filing at the time Barney and his associates purchased it, or if it was not occupied by him when the appellant Land Company purchased it, then no notice can be charged by reason of such alleged possession by Marshall. On the other hand, if he was in possession after his pre-emptive right had been completely exhausted, and after his filing was by the certification of the land *prima facie* cancelled, did this naked possession charge the Land Company with notice of any defect in such certification of the land to the State? We think not.

The mere naked possession of any one at the time the land was purchased by the appellant Land Company would not charge it with notice of any defects in the paramount title obtained from the government through the state and Railroad Company.

Am. & Eng. Enc. of Law, Vol. 16 note P. 804.

Suiter v. Turner, 10 Iowa, 517.

Fassett v. Smith, 23 N. Y., 252.

The above cases hold that "while possession is notice, at least so far as to put the vendee upon inquiry to ascertain by what right the occupant holds, this rule is not extended so far as to give notice of the defects existing in his title, nor yet of the defects in the title paramount to the person in possession."

Assuming that Marshall was in possession when

the appellant Land Company purchased the land, such possession would have charged it simply with the duty of inquiring by what right he occupied the land, and this inquiry would have disclosed that he had no right whatever to such land. This is so for two reasons. First, because his pre-emptive right had lapsed or was completely exhausted, and second, because it was, *prima facie*, cancelled by the certification of the land to the State after such pre-emptive right had expired. It is not the right of Marshall to the land that the court below holds to constitute the defects in the title of the Land Company, of which it is charged with notice, but that Marshall's alleged possession would have disclosed that the title of the Railroad Company was defective because Marshall's filing operated to except the land from the grant. This would be carrying the doctrine of the duty to inquire, far beyond the rule laid down in all the cases, which is, that a purchaser is bound to make such inquiry as a reasonably prudent man would make under like circumstances. But in this case no amount of inquiry would here disclosed any defect because of these facts, for under the law, as then declared, the pre-emptive filing of Marshall did not except the land from the grant. It is the law, as since declared, that has created the defect. It may be true that all men are charged with knowledge of the law but that means the law as it is declared by

competent authority to be at the time of the purchase, not as it may be declared to be a hundred years hence.

Constructive notice, arising from the first purchaser's being in possession, must be taken to extend to all the circumstances attending the equity, and when these are such as do not affect the conscience of the second purchaser, the court will not vacate his purchase.

16 Am. & Eng. Enc. of Law note on P. 803.

Taylor v. Kelley, 3 Jones Eq. (N. Car.) 240.

When we carefully apply the foregoing rules of law to the facts in this case, we cannot but be convinced that the Land Company is not chargeable with notice of any adverse claims to the land in question, or of any defects in the certification of it to the State.

An investigation by the Land Company of Marshall's alleged possession would have simply disclosed that his pre-emptive right to the land had become entirely exhausted or lost under the law by reason of his failure to comply with the legal requirements within the specified time, and that the government had *prima facie* cancelled Marshall's pre-emption filing by certifying the land to the State. It would have also disclosed the fact that, under the rulings of the Secretary of the Interior, the certification of the land to the State was regular and correct in its every detail.

Futhermore it appears by uncontradicted evidence that the Land Company after it had purchased this land from Barney and others, proceeded to legally obtain possession thereof from a mere trespasser; that Marshall duly appeared in said action and the same was duly tried in the District Court of Dodge County, Minnesota, and on the 9th day of December, 1878, the said Court considered, held and adjudged that the Land Company recover of Marshall the possession of such land, from which judgment no appeal was taken. (Rec. P. 28.)

The above action was between the real parties in interest in this case. The plaintiff there, the Winona and St. Peter Land Company, obtained possession of the land in accordance with the well established doctrine that in ejectment actions the plaintiff must recover upon the strength of his own title. The Court, after duly investigating the matter, adjudged the plaintiff's title to the land perfect; that defendant Marshall had no rights therein and it entered its decree accordingly.

In the face of these facts and the findings of the Secretary of the Interior and of the Court of Dodge County, can it be consistently claimed that the Winona and St. Peter Land Company can be charged with any notice arising from Marshall's alleged possession of any defects, fatal or otherwise, in the certifi-

cation of the land to the State? We think not.

The Land Company, after making all the inquiry that a reasonably prudent man would make under like circumstances, could but conclude that Marshall had no rights and that the certification of the land to the State was in all respects regular and valid. The decision of the Secretary of the Interior and the Court of Dodge County fully justified the Company in this belief, and would, we maintain, justify the belief of any reasonably prudent man under like circumstances. There was certainly nothing in Marshall's alleged possession to charge the conscience of the Land Company with notice of any adverse claim or of any defect in the certification of the land. An inquiry into this transaction would have developed nothing to charge the conscience of a reasonably prudent man with notice of any defects in the certification of this land, for such high authority as the Secretary of the Interior and the State Courts of Minnesota, after a full investigation, held the certification to be valid.

Upon the question of Marshall's alleged possession and its effect as notice of any mistake in the certification of the land, we maintain, that the judgment of the District Court of Dodge County, from which no appeal was taken, is conclusive that the Land Company exercised all the care and diligence of a reasonably prudent man under like circumstances

in making its purchase, and that the third aud last element to constitute it a *bona fide* purchaser, to-wit: want of notice, exists.

In conclusion we respectfully submit that the record does not disclose any facts or circumstances sufficient to charge the appellant Land Company with notice of the alleged defect in the certification of the land to the State, or with notice of any defect in the title of its grantor within the rule applicable to *bona fide* purchasers; that the pre-emptive right of Marshall having expired by limitation before the land was certified by the Department to the State, it was properly within the jurisdiction of that Department, and that although the Department may have erred in its construction of the law under which the land was so certified, the legal title to the land passed to the State notwithstanding such error; that the only effect of the alleged error in the certification of the land could be to render certificate such voidable and not void, and that the certificate cannot be set aside, on that ground, as against one, who, in good faith, for value, and without notice of such error, has purchased the land; and, finally, we submit that to sustain the decision of the Court below upon the technical ground, on which that decision is based, thirty-four years after the legal title has passed from the government, would be to make the government an engine for the destruction and un-

settling of land titles in every land-grant State in the Union. It would place the owners of millions of acres of land in these States in a position where their rights to the full enjoyment of their property, and its transfer, would be materially affected by the ever-present fear that, at some time in the future, it may be discovered that there is some latent defect in the original certification of the land, or that there may be some future change in the construction of the law under which these land grants were administered, resulting in the loss of their lands. The policy of the government should be to settle, rather than to unsettle, titles conveyed from it under these grants, which titles are now in the possession of, and held by, those who purchased the same in good faith and for a valuable consideration. This is especially so when, as in this case, there is no pretence of fraud in the original certification, or conveyance, of the land by the government.

For the reasons herein stated we submit that the decision of the Court below should be reversed.

J. A. TAWNEY, AND
H. M. LAMBERTON,
SOLICITORS FOR THE WINONA & ST. PETER LAND CO.

165-483

165-483

NOV 23 1896

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE WINONA AND ST. PETER RAILROAD Company et al., appellants, *v.* THE UNITED STATES. } No. 602.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE WINONA AND ST. PETER RAILROAD Company et al., appellants, *v.* THE UNITED STATES. } No. 602.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This is an appeal from a decree of the United States circuit court of appeals for the eighth circuit reversing the decree of the circuit court of the United States for the district of Minnesota, which dismissed a bill brought by the United States under the act of March 3, 1887 (24 Stat., 556), to restore to the United States the title to 160 acres of land which at the commencement of this suit was held by the Winona and St. Peter Land Company. That corporation had acquired its title through a certification of the land to the State to aid in the construction of the railroad of the Winona and St. Peter Railroad Company.

THE CASE.

The bill was brought against the Winona and St. Peter Railroad Company, the Winona and St. Peter Land Company, and Thomas Marshall, jr., a resident and citizen of the State of Minnesota.

After reciting the incorporation of the two companies, and referring to the act of Congress of March 3, 1857, it charged that no part of the line of the railroad was definitely fixed prior to the 29th day of July, 1858; that many of said lands embraced within the limits of the grant were excepted and reserved from its operation because rights of homestead and preemption had attached thereto prior to said 29th day of July, 1858; "that Thomas Marshall, jr., did, in fact, settle on said land on the 30th of June, 1857, and remain in actual possession thereof until after the line or route of said defendant road opposite said land had been definitely fixed, and while so in possession, and before the line or route of said road was definitely fixed, erected a house on said land and cultivated a portion thereof, and continued to cultivate the same until after the line or route of said railroad was definitely fixed;" that on the 3d day of July, 1857, he made a filing or entry of said tract of land as a preemption claim under and in all things pursuant to the preemption laws of the United States, alleging settlement on said land on the 30th day of June, 1857, said land being then and there open and subject to such preemption entry under the laws of the United States; that, notwithstanding, the preemption rights of said Thomas Marshall, jr., had attached to said land prior to the time when the line of said road was definitely fixed, and were in full force and

effect at said time, by reason of which said tract of land was excepted and reserved from the operation of said grant; that the ministerial officers of the United States did erroneously and without authority of law certify said tract of land to the State of Minnesota on the 1st day of December, 1862, for the benefit of the Winona and St. Peter Railroad Company, and that on the 21st of February, 1876, the State of Minnesota conveyed all its right, title, and interest in said land to the Winona and St. Peter Railroad Company

The bill prayed that the land described be restored to the United States; that the certification thereof to and the conveyance thereof by the State of Minnesota, and the subsequent conveyances, be set aside and cancelled.

The answer of the Winona and St. Peter Railroad Company does not deny the facts alleged in the bill, but insists that by the certification of the Secretary of the Interior the legal title to said land passed to the State of Minnesota and from that State to the subsequent alienees.

ARGUMENT.

The opinion of the circuit court of appeals states that—

> The possession of this land by Marshall, claiming under his preemption filing, was notice to Barney and his associates and to the land company of his claims to the land as a preemptor, and of the fatal defect in their title, to which these claims so clearly pointed (citing cases). * * * The purchase of the land company therefore lacks the essential element of absence of notice of defects in its title, and it can not in this case sustain the defense that it is a bona fide purchaser.

While we concur in the conclusion expressed in the decree of the court of appeals, reversing the decree of the circuit court, we dissent altogether from the course of reasoning of the opinion on which that decree of reversal rests.

The decree should have been in Marshall's favor, not on the ground that the railroad company was the purchaser of the land with notice of Marshall's rights and therefore subject to them, but on the ground that the railroad company was not a purchaser, in any sense, of the land; that the land to which Marshall's right as a preemptor had attached was excepted and reserved from the grant to the State of Minnesota for the benefit of the railroad company; that the certification of these lands by the Secretary of the Interior to the State of Minnesota was without authority of law, was absolutely void, and did not operate to pass any title, legal or equitable, to the State.

THE CERTIFICATION OF THESE LANDS BY THE SECRETARY OF THE INTERIOR TO THE STATE OF MINNESOTA WAS ABSOLUTELY VOID AND DID NOT PASS THE TITLE TO THE STATE.

The doctrine first announced in *Wilcox* v. *Jackson* (13 Pet., 498), that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it, has been reaffirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system in this country.

In *Witherspoon* v. *Duncan* (4 Wall., 210) this court decided in accordance with the decision in *Carroll* v. *Safford* (3 How., 441), that: "Lands originally public cease to be public after they have been entered at the local land office and a certificate of entry has been obtained." (*Hastings, etc., R. R. Co.* v. *Whitney*, 132 U. S., 360.)

In *Whitney* v. *Taylor* (158 U. S., 95) this court said:

> In this respect notice may also be taken of the rule prevailing in the Land Department, where the filing of the declaratory statement is recognized as the assertion of a preemption claim which excepts a tract from the scope of a railroad grant like this (citing cases).

So that the lands occupied by Thomas Marshall, jr., and claimed by him under his preemption filing, were excepted and reserved from the railroad grant to the State of Minnesota; and being so excepted and reserved, the Secretary of the Interior was not authorized or empowered to include them in his certification of lands to Minnesota. In this respect the certification stands as a patent.

In *United States* v. *Stone* (2 Wall., 535) this court said:

> Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. *The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially.* If he issues a patent for land reserved from sale by law, such patent is void for want of authority.

In *Wisconsin Central Railroad* v. *United States*, decided November 16, 1896, Chief Justice Fuller, speaking for the court, said:

> As a general rule and on grounds of public policy, the Government can not be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act, unauthorized payments are made. * * * The question is not presented as between the Government and its officer, or between the officer and the recipient of such payments, *but as between the Government and the recipient*, and is then a question whether the latter can be allowed to retain the fruits of action not authorized by law, resulting from an erroneous conclusion by an agent of the Government as to the legal effect of the particular statutory law under, or in reference to, which he is proceeding.

The learned Chief Justice was speaking, it is true, of payments of money erroneously made by officers of the Government under mistaken views of the statute; but the reasoning of his opinion applies as well to the public lands, or to any other property of the Government thus unlawfully granted away.

In *Shiver* v. *United States* (159 U. S., 494) Mr. Justice Brown, speaking for the court, said:

> Indeed, this court has settled by repeated decisions that the claim of a homestead or preemption entry made at any time before filing a map of definite location of a railway prevents the lands covered by such claim from passing to such railway under its land grant, even though such entry be subsequently

abandoned. (*Kansas Pac. Ry.* v. *Dunmeyer*, 113 U. S., 629; *H. & D. R. R.* v. *Whitney*, 132 U. S., 357; *Whitney* v. *Taylor*, 158 U. S., 85; *Sioux City, etc., Land Co.* v. *Griffey*, 143 U. S., 32.)

In *Noble* v. *Union River Logging R. R.* (147 U. S., 174) it was said:

> In the one class of cases it was held that if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the Land Department had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant or in issuing a patent *is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding.* (*Polk's Lessee* v. *Wendall*, 9 Cranch, 87; *Patterson* v. *Winn*, 11 Wheat., 380; *Jackson* v. *Lawton*, 10 John., 23; *Minter* v. *Crommelin*, 18 How., 87; *Reichart* v. *Felps*, 6 Wall., 160; *Kansas Pacific Rwy.* v. *Dunmeyer*, 113 U. S., 629; *United States* v. *Southern Pacific R. R.*, 146 U. S., 570.)

In *Doolan* v. *Carr* (125 U. S., 624) Mr. Justice Miller said:

> There is no question as to the principle that where the officers of the Government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had lawful authority to make conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise

such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable, etc.

From all which it would seem to be conclusive that Marshall's preemption claim reserved the land to which it was attached from the railroad grant, under the act of 1857, to the State of Minnesota, and that such grant will not be construed as embracing these lands; that, not being embraced within the grant, because already disposed of to the preemption claimant, the Secretary of the Interior was without authority or power to certify this land to the State of Minnesota; that, acting without authority or power, his act was absolutely void and of no effect; that, being void and of no effect, it could not operate to pass any title legal or equitable to the State of Minnesota; that the State of Minnesota, having acquired no title under the certification, could convey none to the railroad company; that the railroad company, acquiring no title by its grant, can not be said in any sense to be a *purchaser*. Not being a purchaser, the court of appeals erred in holding that Marshall was entitled to his land only because the railroad company had purchased it with notice of his superior equity.

Marshall was clearly entitled to his land, not only as against the railroad company, but as against the State of Minnesota and also the United States. And the decree complained of was erroneous, not in its results, but in the grounds on which it rested.

The error of the circuit court and of the court of appeals in this case, as in *United States* v. *Winona and St. Peter Railroad Company*, referred to in the opinion of

Judge Sanborn, consists in the view that the officers of the Land Department are invested with and do exercise a judicial function in making certification of lands under the railroad grant acts of Congress and that their acts are in consequence not to be reviewed by the courts; that while those acts may be voidable, they are not void, and, consequently, they do operate to pass the legal title to the land so certified.

These views, reiterated and enforced in all this class of cases, are directly opposed to the principle which has been recognized, asserted, and applied by this court since 1839, when the case of *Wilcox* v. *Jackson*, in 13 Peters, was decided.

We submit that the decree of the court of appeals, reversing the decree of the circuit court and remanding the cause to that court, with directions to enter a decree granting the relief as prayed in the bill of complaint, should be affirmed, but it should be affirmed, not for the reason stated in the opinion of the court of appeals, but for those presented in the original bill of complaint.

HOLMES CONRAD,
Solicitor-General.